UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
W.R. Grace & Co., et al.,	.	
Debtor(s).	.	Bankruptcy #01-01139 (JKF)

Wilmington, DE
February 25, 2002
8:00 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY JUDGE

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THE COURT: Please be seated.

(Pause in proceedings)

THE COURT: This is the matter of W.R. Grace, Bankruptcy #01-1139. There is an entire series of agenda binders this morning. I don't have any preference as to the order. Mr. Bernick, if you would enter your appearance, and then we'll get started. I'd simply ask that any attorney who is going to speak identify yourself on record when you speak, please.

MR. BERNICK: Yes, David Bernick for the Debtor Grace. Your Honor, with respect to the agenda, per the typical format we've got the continued matters and the uncontested matters. And we don't have anything to take up in connection with any of those. I don't know that anybody else does. There are three contested matters that are on for this morning. Actually, a total of four. But two of them are very closely related. The first is the Motion to Dismiss the case, item 9. The second is our revised Motion -- that's Debtor's revised Motion for a Case Management Order with respect to the non-personal injury claims. And then third we have two matters that are related, which are our objections to the retention of Hilton and Rabinowitz, who are two experts that the Official Committee for Property Damage had sought to retain. So those are the matters that are on for discussion this morning. There's another contested matter that was

listed, which is our revised Motion for a CMO as to the personal injury claims. Per Your Honor's instructions last time, that was simply filed for transfer to Judge Wolin. We don't have to take that up. And I think that the remaining two matters that were listed on the agenda, that is actually there are a total of three -- 14, 15, and 16 -- all three of those have been continued. So that leaves us with the three matters this morning: The Motion to Dismiss; the Case Management for non-personal injury; and the objections to the two experts.

THE COURT: Okay. Maybe the numbers are different on the amended agenda than they are on the original agenda. Because I'm looking at the original agenda, and the items are different. And I made notes on probably the original that I have. Let me see here. Yes. The Motion to Dismiss the case is item 10 even on the amended agenda.

MR. BERNICK: Okay.

THE COURT: All right. 13 and 14 are the requests of the Committee for their retention of the consultants. 11 is the new Case Management Order. 15 and 16 both are related to Ms. Gerard's Motion to Intervene.

MR. BERNICK: Right.

THE COURT: And those are the two that are continued. Correct?

MR. BERNICK: Well there was another one that was

continued, which was the -- those two are continued. That's correct, Your Honor.

THE COURT: Okay. Any others?

MR. BERNICK: Yeah, there was the Motion for Preliminary Injunction that related to the claim against National Union Fire Insurance Company. It was a Motion for a Preliminary Injunction and TRO, adversary proceeding. And that also has been continued.

THE COURT: What number is that on the agenda?

MR. BERNICK: That was number five. That's probably what accounts for it then.

THE COURT: All right. Okay. I had a question about one item. In item -- let me find it. Pardon me. Oh, no, really it's only about item 12. That's your revised motion with respect to the asbestos personal injury claim. I have not yet done an Order that transfers that case to Judge Wolin. But I will as soon as I get back --

MR. BERNICK: Okay.

THE COURT: -- to Pittsburgh. So that motion will in fact be heard by him. Do you need to work out any process? I think it's working well enough that if you file items related to that agenda with the Clerk, they'll simply be transferred to Judge Wolin. And I'll assure you that I'll also check, as long as they're in an agenda somewhere that indicates that they belong to Judge Wolin, to make sure that they're

appropriately transferred to him. Has he worked out something with you about e-filing or sending copies of documents to him by e-mail or anything of that sort?

MR. BERNICK: Yeah, I don't think that we've actually had that specific discussion with him. At the same time, I'm not aware of any problem that we have faced that way either.

THE COURT: Okay.

MR. BERNICK: I'm not sure there's actually been an occasion to file anything before Judge Wolin with the exception of --

THE COURT: This one.

MR. BERNICK: -- this one. Right.

THE COURT: Okay. Well, I will discuss with him if there's some particular procedure he wants in place. And if so, I'll include it in the transfer Order. All right. What would you like to start with now?

MR. BERNICK: Well, I guess we should start with the Motion to Dismiss.

THE COURT: All right. Item 10?

MR. BERNICK: Yes.

THE COURT: Okay. And pardon me while I get the right form then.

(Pause in proceedings)

THE COURT: Good morning.

MR. SOBOL: Good morning, Your Honor. My name is Tom

Sobol, S-O-B-O-L, with the law firm of Leif, Frazar, Hyman & Bernstein, here on behalf of the Zonolite Attic Insulation Claimants in connection with the Motion to Dismiss. In SGL Carbon, Your Honor, the 3rd Circuit held that a Chapter 11 bankruptcy petition is subject to dismissal under Section 1112(b), unless filed in good faith. Now, Your Honor, this motion and the good faith requirement under the Bankruptcy Code is not a pro forma requirement. The SGL's Court, the 3rd Circuit, could have rested its decision in SGL on the basis of the statutory language cited, the legislative history that it pointed out, and the observation that, as it said, (quote) "The conclusion of every Court of Appeals to address the issues is clear. Chapter 11 petitions must be filed in good faith, and are subject to dismissal."

The 3rd Circuit did not rest its decision though on what would commonly be recognized, I think, as a more than sufficient basis upon which to make this conclusion. Instead it looked at two other things. First, to the equity underpinnings of the Bankruptcy Code. And second, to the purposes of Chapter 11 proceedings themselves. Now, when they're looking at equity, what the Court said was this. It said that there are strong roots in equity of Chapter 11 proceedings. And it looks to both the avoidance of economic dismemberment, but in a manner which does equity and does fairness to all the Parties-In-Interest. The Court also

looked to the nature of Chapter 11 proceedings, and to the purposes underlying Chapter 11 proceedings. In doing that, Your Honor, what the Court concluded essentially was this. That it is an extraordinary event when an American corporation files for a Chapter 11 petition. And that when that corporation does so, it must be doing so in good faith and consonant with the purposes in mind behind the Chapter 11 proceeding.

The Court said this. "It is easy to see why Courts have required Chapter 11 petitions to act within the scope of the Bankruptcy laws. Chapter 11 vests petitioners with considerable powers, whether it's the stay or it's discharges or other things that are unique, obviously, to bankruptcy. That -- and these can impose significant hardship on particular Creditors." Now this is most important, Your Honor. The 3rd Circuit said, "When financially troubled petitioners seek a chance to remain in business, the exercise of those powers is justified. But this is not so when a petitioner's aims lie outside the Bankruptcy Code."

I start with this review, Your Honor, which I know that the Court is more than capable to be able to review the SGL Carbon decision, but essentially to draw this point. When coming before this Court, W.R. Grace seeks to invoke the extraordinary powers of the Chapter 11 proceeding. When it does so -- when it seeks to change the landscape so markedly

in terms of how it is that the claims of hundreds of thousands of tort Claimants are affected, it must do so in good faith. And it must take seriously the mandate of the 3rd Circuit to come forward with evidence that it is a financially troubled institution, or that it has such a sufficient overwhelming number of claims that its managerial capacity has been seriously undermined.

THE COURT: Well, number one, I don't read SGL Carbon, I don't read the Bankruptcy Code, I don't read any other case that I can recall offhand to say that Chapter 11 is only for insolvent corporations.

MR. SOBOL: Absolutely, Your Honor.

THE COURT: Fine, okay. So then we're looking at point two, which is the management of claims. I'm faced with a Debtor who has in excess of -- known, if I recall correctly, 200,000 plus claims. Unknown, if I believe you, your client that is with respect to the Zonolite Attic Insulation, with potentially 15,000,000 homes across the country from the 1920's through the early 1980's with however many resales of those homes may have occurred in the interim, with a universe of Claimants that is broad beyond all human imagination, and certainly unknown in scope. Now, how can anybody deal with that universe absent something like the structure of Chapter 11? And what more do I need to know, other than that?

MR. SOBOL: Okay. First, Your Honor, you're

absolutely right. The 3rd Circuit recognized that a company need not be insolvent in order to file a bankruptcy petition. And the 3rd Circuit made that clear. The 3rd Circuit also said, however, that in order for a company to come before it, even if it has litigation issues, it must show that it's either financially troubled or that there is a serious inability to manage the claims. Now, addressing your question as to the manageability of the claims, it's very important to recognize this. First, as to Zonolite Attic Insulation claims, pre-petition those claims were well under control. Those claims were before the Multi-District Litigation Panel. They were sent to a Federal District Court in Boston.

THE COURT: Well, some of them. If they had all been sent there, I wouldn't have the various request that I have for a certification of class action. So certainly you can't contend that they're all before a State Court or the MDL Panel. They're not, or I wouldn't have these motions to certify the class. They would have already been certified.

MR. SOBOL: With all respect, Your Honor, they were.

THE COURT: All the classes were certified?

MR. SOBOL: No. What was before the Court was this. All the Federal claims, all the claims, all the Zonolite Attic Insulation claims that were filed in the country were pending either before the MDL Court, prepared and already having briefed the issue of certification which Judge Saras was

planning to hear on April 25th. Second, they were a certified class in Barbonti, in Washington State. And third, there was a proposed class action, I believe, in South Carolina. Those three cases were well under control, and were being managed.

THE COURT: And how many more are there?

MR. SOBOL: None.

THE COURT: There are no other classes out there? I'm not gonna deal with any issues except for Massachusetts, Washington, and South Carolina. That's it.

MR. SOBOL: Correct.

THE COURT: That's the only place that I'm gonna have any Zonolite issues at all in this case.

MR. SOBOL: Those were where the claims were pending.

THE COURT: Well --

MR. SOBOL: The answer is yes.

THE COURT: The answer is yes, that I'm only dealing with Zonolite in three states.

MR. SOBOL: You're dealing with --

THE COURT: Not foreign countries and not any place else. Only three states.

MR. SOBOL: That's correct, Your Honor. In other words, I want --

THE COURT: Okay.

MR. SOBOL: -- to make sure it's clear. Okay?

THE COURT: So do I. Because I want this record very

clear --

MR. SOBOL: Sure.

THE COURT: -- that there will be no Zonolite claims filed by anybody who doesn't have a home in one of those three States.

MR. SOBOL: No, that's not what I mean. In the MDL there was a proposed national class action on behalf of all property owners resident in the United States and its territories. So that covered the landscape of the United States and its territories in the MDL. Carved out of that proposed class action were the residents in the State of Washington, and the residents in the state of South Carolina, to the extent covered by the South Carolina case. Accordingly, litigation with respect to Zonolite Attic Insulation claims was pending in only three Courts. Those Courts were handling all of the Zonolite Attic Insulation claims in the country, and were being well managed.

THE COURT: What --

MR. SOBOL: And W.R. Grace makes no question in anything that it's filed to this Court for the past approximately three-quarters of a year, that that is not the case.

THE COURT: Well, my understanding -- and, again, please correct me if I'm wrong -- of those three litigations is: Number one, the South Carolina class has not been

certified; number two, in the Multi-District Litigation Judge Saras had issued a Case Management Order, but I don't even know if discovery has commenced in that case.

MR. SOBOL: They have.

THE COURT: In the Barbonti case, that case was a little further along than the MDL action. I don't recall Judge Saras excluding anything to do with the South Carolina case in the Orders. It could be in there. It might just be my recollection that's incorrect. But it did definitely --

MR. SOBOL: Yes.

THE COURT: -- her Orders did definitely exclude the Washington State litigation.

MR. SOBOL: Yes.

THE COURT: All right. So now I have the possibility of three suits with inconsistent results, and major litigation in three forum. Why?

MR. SOBOL: I don't think that there was any possibility, Your Honor, with all due respect, of inconsistent results. Because the way that the class was proposed before Judge Saras, it would have excluded any other Court that at that time had certified a class. And that's why there wouldn't have been any inconsistent rulings. Discovery was well under way before Judge Saras. She was scheduled to have a trial -- or at least to have concluded discovery roughly by the Spring of this year. And, again, there hadn't been any

issue raised by Grace regarding its inability to manage the Zonolite Attic Insulation claims. In fact, its position before the MDL Panel had been that the most efficient and logical way to deal with Zonolite was to consolidate the cases in the country, and have them all sent to Boston. And that's precisely what happened.

With respect to the numerosity of the claims on the personal injury side, Your Honor, I would say the following. First, W.R. Grace does not make any claim that it was not capable of managing those cases. In fact, it says it was. In its reply, or in its opposition, at page 10, in this dismissal motion, it says that -- at the bottom it says that the Zonolite Attic Insulation Claimants' reliance on the fact that Grace historically managed -- they underline "manage" -- the claims against it, ignores the fact that Grace could not resolve the claims against it, particularly with the spiking claims as it indicated recently. In other words, they say by way of argument, but without by way of factual support or affidavit, that they were capable of managing those claims, as they historically had done, but that they wanted to get a different way to liquidate to try to resolve the personal injury claims.

I'd also say this, Your Honor. To be sure, and I make no bones about it, there are many, many personal injury claims that are out there that are pending against W.R. Grace. The

problem here is that that only takes Grace so far. The question is, has Grace come forward with evidence, and that evidence showing that management of Grace was seriously affected in some way, certainly consonant with the notions of what's set forth in SGL such that it couldn't go forward?

Now, I would anticipate, Your Honor, that you would have, among the many concerns regarding this motion, the following two concerns. One would be, isn't that enough? What I would suggest, Your Honor, is that a review of the SGL decision points out that Judge Farnan, when he issued findings of fact regarding SGL's situation, he issued findings saying that it appeared that litigation did cause many distractions. And he also indicated that it looked like the claims against SGL harbored in the long term problems with respect to SGL's future viability. The 3rd Circuit, not only did it impose a good faith requirements, but it found those findings clearly erroneous, reversed Judge Farnan, and issued an Order directing that the bankruptcy case be dismissed because of the insufficiency of the subsidiary facts that had been put before the SGL Court. Here, I'd suggest that that applies with equal weight.

Here, there's no question, to be sure, that W.R. Grace, like SGL, is financially healthy, that its revenues are growing, that its debt structure was fine, that it was not experiencing difficulty of incurring debt and going out and

getting beneficial debt for the company. Here, also it's clear, and perhaps unlike many other major mass tort bankruptcies, Grace does not say anything about its inability to manage its claims or how it affects its business. The other concern Your Honor would have is, well, aren't there other major mass tort bankruptcies out there that involve asbestos claims where it appears that the Debtor has stayed in a Chapter 11? And the answer to that is yes. But the SGL Court drew distinctions between some of those other mass tort bankruptcies. And I'd suggest that we can do so here. It's in the briefs, but I wanted to be able to graphically show you. May I approach, Your Honor?

THE COURT: Thank you.

MR. SOBOL: What I've handed you are charts of materials that are already in the record. But if you could go to the last page, Your Honor, which looks like this comparison chart -- I'm not sure if you have it before you.

THE COURT: Yes.

MR. SOBOL: Does it look like this, Your Honor?

THE COURT: Oh, no.

MR. SOBOL: It was late last night.

THE COURT: Okay.

MR. BERNICK: Your Honor, can I ask that the chart be provided to other parties?

(Pause in proceedings)

MR. SOBOL: Do you have the comparison chart, Your Honor?

THE COURT: Yes.

MR. SOBOL: In the SGL case, Your Honor, the Court drew comparisons between Johns Mansville situation and a couple of other cases, not necessarily A.H. Robins and Dow Corning, though it did cite it. If one goes to those cases -- I'll look at the first two columns, if you will. In the A.H. Robins bankruptcy, the Court had observed that there was a critical depletion of company operating funds, and that A.H. Robins' unrestricted funds were down to $5,000,000. Similar kinds of issues faced Dow Corning, though to be sure not as severe. But insurers had paid a tiny fraction of the funds that were owing Dow Corning. And it was stated in the decision that -- and by Dow Corning -- that it could not afford to fund a settlement and defend the existing and escalating claims. In Johns Mansville the company was shocked from a first time $1.9 billion reserve that it needed to make. And that was accelerating close to a half a billion dollars in borrowance.

When one compares those financial circumstances to the situations facing Grace, it's a remarkable and striking difference. With respect to W.R. Grace, it had roughly $400,000,000 in cash on hand, and was sufficiently liquid to carry on its affairs. If one looks to a couple of other

points too, in the A.H. Robins situation the Court had observed that for A.H. Robins things were so bleak that financial institutions were unwilling to lend it money. And if you go to the Johns Mansville situation, the Court had observed that it faced partial or perhaps total liquidation. In this situation involving Grace though, Grace was able to come up with a quarter of a billion dollars of financing in recent months.

The long and the short of it, Your Honor, is that the 3rd Circuit in the SGL case took pains to point out that -- I want to make sure I get the right cite, because I think really the crux of a part of their decision appears here. I believe this appears at page 163, Your Honor. Is that the Court drew distinctions between situations where a financially healthy company might file for bankruptcy, or when there are supposed mass tort bankruptcies, if you will. The Court said this. "In those cases, however, the Debtors experienced serious financial and/or managerial difficulties at the time of filing." And then the Court pointed to other situations, including Johns Mansville, and quoted at length from those other decisions, pointing out that there is a need to show either one of those two things.

I would also say this, Your Honor. If one honestly takes a step back and looks at Grace's position in this case, its lament is essentially this. That when trying to litigate

cases in the State Court system, or I guess sometimes they just say Court system, so I assume that they mean the Federal Court system as well -- they don't like it. They don't think that it's fair. They don't think that they're able to get a fair shake at the trial. They don't like the kind of money that they have to pay out to the personal injury Claimants. And as a result -- and this is in the charts that are before you, and in the record -- the president of Grace from the date that they filed for bankruptcy basically says, "We think that the tort system's broken. We want to go somewhere else to try to get our claims liquidated. Not that we're having any problem managing them. Not that we're in any financial trouble. But we want to find a different forum to have our cases heard." And their lament continues that one of the reasons the tort system's broken, is that you can't do things like class actions, or you can't do things like aggregated claims in the tort system. And then it points to cases like Ortiz or Am Chem, where the Supreme Court has made it more difficult, or at least more exacting, the requirements of class actions.

The problem with this argument, frankly, Your Honor, was that it was totally rejected by the 3rd Circuit in the SGL decision. And at the end of that decision the SGL Court said, "In reaching our conclusion, we are cognizant that it is growing increasingly difficult to settle large scale

litigation. We recognize" -- and then it cites Ortiz and Am Chem for their recognition that it's difficult to resolve large scale litigations. "We recognize that companies that face massive potential liability and litigation costs continue to seek ways to rapidly conclude litigation to enable a continuation of their business, and to maintain access to the capital markets. The Bankruptcy Code presents an inviting safe harbor for such companies. But this lure creates the possibility of abuse, which must be guarded against to protect the integrity of the bankruptcy system, and the rights of all involved in such a proceeding."

So, Your Honor, what I'd ultimately urge this Court to be mindful of is this. What W.R. Grace has done in this case is it's come before you and asked you to exercise extraordinary powers under the Bankruptcy Code. It also asks you to do so despite the existence of the SGL decision. Certainly at a minimum, if it seriously wants to take advantage of your powers in this case, ought it to have come forward with far more evidence, by way of affidavit, declaration, true documentary record that it's either suffering financial hardship such that it could come into this Court, or that somehow the personal injury cases for which it is -- the only reason that it rests really it's the numerosity issue -- were it difficult to manage, or so difficult to manage that it ought to be able to invoke the Bankruptcy Code. That last

issue as to whether or not the numerosity was such that it would affect the managerial capacity, is not something that it has ever claimed. It certainly hasn't gotten beyond that which was before Judge Farnan in the SGL decision.

THE COURT: Well, you know, to a certain extent I suppose, particularly as lawyers, we prize the rhetoric that we use. But to a large extent isn't it the same thing as saying, "I disagree with the State tort system. I think I'm being treated unfairly. It's difficult for me to get consistent rulings. I'm not able to handle class actions or to aggregate claims." Isn't that just another way of saying, "I can't manage the responsibility that the State tort system imposes on me," without using those same words? I mean you've got a company that to this day professes that it has sound financial underpinnings. I don't know whether the company's insolvent from a book perspective, or not, based on the universe of claims that haven't even been filed against it yet. So I'm not going there. I'm not talking about insolvency. But I'm not sure that it's a correct analysis to say that because the Debtor doesn't use the words that SGL might use, assuming that SGL is even factually enough similar to these cases that it applies in that respect, that the Debtor isn't, nonetheless, unable to manage the litigation that it's facing.

It seems to me that's exactly what the Debtor is saying.

"I can't manage the litigation in the State Courts. And so I want a different forum to do it. I want to get out of 50 different State Court jurisdictions, not to mention the several hundred different Courts in which actions in each of those States could be filed, and get into one forum where I can manage it all." It seems to me that that's the very position the Debtor is asserting.

MR. SOBOL: I think that that's right, Your Honor. I think that's the position they're asserting. But I also think, Your Honor, that that is precisely the edge that the SGL Court was trying to make. In other words, the SGL Court was saying, "If your claim is that you are unhappy with the way that the tort system liquidates, adjudicates claims, and that's your only reason for being in Bankruptcy Court, you're not allowed to be here."

THE COURT: Well, I don't know that I can go quite that far with SGL. There's -- on the facts, the SGL situation is so egregiously different from a company that is looking at hundreds of thousands of known Claimants with asbestos personal injury, millions of potential Claimants with property damage. I just can't on the facts see how there is a similarity between this case and SGL.

MR. SOBOL: Where there is on the facts, Your Honor, or not, certainly what the Court stated, particularly when the Court on its own evoked Am Chem and Ortiz, and said that those

are not reasons why it is that one invokes the Bankruptcy Code, I would suggest that there is a hurdle that Grace has not taken seriously to show something more other than, "We have lots of claims. And we'd rather --

THE COURT: Well --

MR. SOBOL: -- be in Bankruptcy Court."

THE COURT: -- I think SGL does stand for the proposition that the bankruptcy isn't to be a simple device for getting around a litigation issue. If you've got what could -- well, reduced to its essence is a two-party dispute, the Debtor against some other entity or group of entities with a similar interest, then the Bankruptcy Code is not supposed to be used as a means of avoiding a different forum, and dragging cases here for litigation, imposing the stay in a fashion that may do some injustice to those other parties. I think SGL clearly stands for that, and cites Am Chem and Ortiz for that proposition. It's not a litigation get-around, I guess is the right word. But I don't think that SGL or any of the other cases stand for the proposition that if there is a real need to file to either manage claims or to resolve your financial picture for a reason other than management of claims, that you don't have access to the Bankruptcy Code.

I'm having some difficulty understanding what it is that you allege is bad faith here. Because in order for the Debtor to have to come forward to show good faith, you've got to tell

me what's bad faith. What did the Debtor do that was so improper here, that the Debtor now has the burden of affirmatively demonstrating some good faith?

MR. SOBOL: Well, I would suggest that there's no short list that exists there, Your Honor. First, with respect to the Zonolite Attic Insulation claims, what the Debtor has essentially tried to do is -- and -- but has -- it has so far accomplished doing, is that it stopped material information going to the putative class representatives. It stopped dead in its tracks the activities of an Article 3 Judge, appointed by the Multi-District Panel to adjudicate those claims. And has -- and now in bankruptcy has not said, "Well, all right. We'll use the same procedures that were in effect for the MDL now that we're in Chapter 11." It's tried to markedly change the way that those cases and those claims get adjudicated. So -- well, I --

THE COURT: That's what bankruptcy does. It gives you a different procedural device for handling claims. It may or may not work in a particular case. But it gives you an option you don't have if you don't file bankruptcy. What's bad faith about taking advantage of what the statute provides you?

MR. SOBOL: Because if you don't have the basis upon which to be in the Bankruptcy Court in the first place, if you're not financially troubled, or if you're capable of

managing your claims, then you're not enabled to just be able to change the rules and the substance by which the claims get adjudicated. I'd also say, Your Honor, that while on the facts the SGL case involved a party to party dispute, if you will, did not include numerosity in terms of an issue, the 3rd Circuit went out of its way to bring in the notion that long term viability of a company in mass tort situations may be inviting, but isn't enough. In other words, the Court went out itself and looked at Johns Mansville.

THE COURT: It wasn't a mass tort case. SGL Carbon, the reason that it went up was not because of mass tort issues. Was it? So whatever the 3rd Circuit said is not part of its holding in that case. Is it?

MR. SOBOL: That's correct. Not its holding on the facts. The question is whether or not we look at what the 3rd Circuit's telling us by way of adjudicating good faith claims are not beside that point. But certainly it's not within the heart of the holding, to be sure. But if one wants to take seriously the language, then what the Court's telling us is the Court went out of its way essentially to point to other mass tort situations, and to show that in those circumstances there were financial hardship. And that in those kind of situations, although Am Chem and Ortiz invite safe harbor to the Bankruptcy Courts, that's not what the good faith requirement permits.

So, you know, going back to the question regarding, again, whether or not Grace's presentation here or it's, you know, seeking resort is in good faith or bad faith here, whether or not I have shown that they're in bad faith, not only does the -- Grace bear the burden on that issue to show its good faith -- not others to show its bad faith -- but I would say --

THE COURT: Well --

MR. SOBOL: -- again --

THE COURT: No, wait. There is no explicit requirement of good faith in Chapter 11. SGL and several other cases have imposed as a gloss, and I wholeheartedly endorse the concept, that there is a good faith aspect to invoking bankruptcy relief. But the issue is, how does it come up? Unless somebody puts that good faith at issue by showing that there is some reason why the Debtor has to affirmatively demonstrate it, I don't understand any of the Circuit opinions to say that the Debtor, in order to file, has to affirmatively demonstrate good faith. I think there's the equivalent of a rebuttable presumption that the case is filed in good faith, because you don't have to file affidavits that say, "This is the reason we're filing." The Codes lists what you have to do. You've got to file your schedules and your petition. You've got to list all your Creditors and all your assets. There is no allegation that Grace didn't do any of

that. So what is it that Grace has to affirmatively demonstrate?

You're saying that Grace has to affirmatively demonstrate that it can't manage its claims. I think there is sufficient justification for that kind of a finding probably without evidence in this record, because the facts are not in dispute. Grace faces hundreds of thousands of known, let alone unknown, personal injury claims, is subject, according to all of the information on other briefs that have been submitted by all the parties, massive numbers of suits that go to trial in the hundreds weekly, all across the country, takes massive resources both in terms of human time and energy and financial resources to defend those actions, takes its time and its resources with respect to its business operations, and diverts them into the management of that litigation, and hasn't even yet got a handle on what the universe of property damage claims pursuant to the Zonolite Attic Insulation will be. I'm having some difficulty understanding how those facts which I don't think are in dispute -- is any of that in dispute?

MR. SOBOL: The one part that is in dispute, Your Honor, is that recognizing all of what you've said, Grace had no problem doing it.

THE COURT: Okay. The facts themselves are not in dispute. What you're telling me is that there is a different conclusion that can be drawn from those facts. But the facts

are not in dispute.

MR. SOBOL: Correct. But there's another fact that's also not in dispute. And the other fact that's not in dispute is that although there were numerous claims pending in multiple jurisdictions on the personal injury side, okay, it had no problem managing those and paying those claims. The question ends up being that they just didn't like the results. And that's really the issue. And, again, if we take Grace at its word, and we look to page 10 of its response, that's what it says.

THE COURT: It does say it didn't like the results. I'm sure every --

MR. SOBOL: Right.

THE COURT: -- Debtor that's facing asbestos mass tort litigation doesn't like the results. So I don't think that's bad faith that they don't like the results.

MR. SOBOL: And what I would suggest is the additional bad faith though here, Your Honor, is the affirmative statements by Grace, some of which I've clipped in the charts that I put before you, that the reason it's coming into bankruptcy is to seek a different forum to liquidate. Not to have its business reorganized, but to have the tort system reorganized.

THE COURT: Well --

MR. SOBOL: That's what they're out to do.

THE COURT: -- I don't think the Bankruptcy Courts are about to reorganize State tort systems. But Congress has provided an alternative mechanism for Debtors to liquidate and manage claims. I am still having a great deal of difficulty understanding why it's bad faith to take advantage of a privilege that Congress has, in its wisdom, decided that Debtors have. That's where I have a disconnect.

MR. SOBOL: Sure.

THE COURT: Why is that bad faith?

MR. SOBOL: Okay. Because the Courts require that it is a privilege. It's not an entitlement. And in order to have this privilege, not an entitlement, the Courts have said either you must be in financial extremes, or there must be something so affecting the ongoing operations of your business and your ability to operate your business, that you need to seek sanctuary in the Bankruptcy Court. Now, I can't do much more than that, Your Honor, other --

THE COURT: Okay.

MR. SOBOL: -- than to say that my reading clearly under SGL is that the Court reached out into these mass tort situations and prescribed rules by which someone would need to come forward with evidence, not argument, as to meeting that burden.

THE COURT: All right. Well I certainly hope SGL isn't going to stand for the proposition that Debtors have to

wait until they're in financial extremis before they file bankruptcy, because we already have too many Chapter 11's that wait too long to file, and as a result have no cash, and as a result don't make it out. So if this case was, in my view, wise enough to be filed before that happened, I applaud that decision. I can't criticize it.

MR. SOBOL: Well, again, Your Honor, I think that the SGL Court, the 3rd Circuit, expressly raised that question as to whether or not, you know, that the bankruptcy laws encourage early filing. However, the Court said that that does not mean premature filing. And indeed I think what the SGL Court expressly held was that a Debtor must prove, and cannot enter at a time that it is financially healthy and isn't experiencing the kind of overwhelming managerial difficulties that I've indicated. The Court expressly was aware of that concern, and essentially held, "No, you do have to wait. You do have to wait until things are critical before you use these extraordinary protections."

THE COURT: I'm not sure I can read SGL to say that. Find that word for me in the opinion. If it's in there, I've --

MR. SOBOL: Sure.

THE COURT: -- missed it. Okay. Because if things needs to be critical, we might as well write Chapter 11 out of the Code.

MR. SOBOL: The word "critical" is not there. But what the Court said is, at page 163, when talking about how the Bankruptcy Code encourages early file, said this. "Such encouragement, however, does not open the door to premature filing, nor does it allow the filing of a bankruptcy petition that lacks a valid reorganizational purpose." Then about a paragraph or two later, the Court says, "We do not hold that a company cannot file a valid Chapter 11 petition until after a massive judgment has been entered against it." Okay? But then it says, "In cases where that has been done, Debtors experienced serious financial and/or managerial difficulties at the time of the filing."

THE COURT: Yes, after a mass judgment was entered against it, yes.

MR. SOBOL: And the Court is saying --

THE COURT: Which is the situation --

MR. SOBOL: -- that that's what entitles --

THE COURT: -- in SGL.

MR. SOBOL: Yes. So what I'm suggesting, Your Honor, here is just that obviously the 3rd Circuit was mindful of the concern of early filing, but said that, you know, that does not permit filing at any time. And in my view drew the distinction of where it is that I've indicated earlier.

THE COURT: Okay.

MR. SOBOL: Thank you.

THE COURT: Mr. Bernick?

MR. BERNICK: Yes, I'll be brief, Your Honor. Three points really. The first begins with the fraudulent conveyance litigation which provides a meaningful backdrop to the motion that's before the Court. Just last week we were in a different room -- a jury meeting room -- with Judge Wolin. And Mr. Lockwood and Mr. Baena were not looking merely as relaxed as they do here today. They were leaning forward, because they were very, very focused on obtaining the authority to pursue fraudulent conveyance litigation. What was the central contention in that litigation, and what is the central claim? It was and is that Grace was insolvent in 1998, insolvent in 1996. Now, was that because there was negative cash flow? No. Was it because there was negative equity? No. It's because their central theory in this case is that the estimated future liabilities swamp the company and make it insolvent. That's their position in this case. Is the world changed since 1998, which is what the fraudulent conveyance claim focuses on? No, it's not. They'll still say that we are swamped by the future estimated asbestos liabilities. It's true in every one of the cases that's now on file. They say the future swamps the current claims, swamps the company, insolvent. It will be the central theme in this case. You ask Mr. Lockwood today does he believe that Grace is solvent? He'll say, "No, Grace is not solvent." His

partner Mr. Inselbrock told me that the first day we showed up in the Babcock case where there was no negative cash flow, no negative equity, but in their view estimated future liabilities that were -- you know what he said? "You are insolvent. You belong here."

It's no accident that the ACC or the property damage have filed no Motion for Dismissal of this case. Because it'd be completely contrary to their entire theory of the case. That's where the Committee's at. What about the Zolonite Attic Insulation Claimants? Are they any different? Well interestingly, the day this case was filed they initiated their own lawsuit, called the Woodward lawsuit. And in that lawsuit they asserted a fraudulent conveyance claim. They said that this company was insolvent, not today, but two or three years ago. It was only on the eve of the Case Management Order hearing that was set on November 21 that they decided to ride a different horse. They decided to ride a horse that says, "Well, let's get this company out of 11 so we can then pursue the class action litigation involving homes all over the country," millions of claims in their view, "so we can then threaten them with an involuntary insolvency, and maybe we'd get our own separate settlement." That's what's going on here. That's their agenda. That's point one.

Point two, what was our view of why we filed for 11? And is it true that there's no record, as counsel asserts, no

affidavit, as counsel asserts, showing that there was a management problem? Well, the reason that we filed for Chapter 11 is I know already familiar to the Court. But it does tend to highlight where we're going with this motion. This is a chart that was attached to our original information. We've shown it many times before. As of 1996 it shows two complaint filings. And then it -- as you get here to 1998, by that time, which is when the fraudulent conveyance claims say the company was insolvent, and the Committees will say that the estimated future liability is -- shows that the company was insolvent, we were at a downward trend. And, in fact, we did the estimates, we used the models, we used their own models, and they showed that the future liability was under control, and the company was in fact solvent, so those transactions would go forward, and the company would still be solvent.

What's happened since? Well what's happened since is, as you can see, that the claims skyrocketed. There is this spike that occurred in the year 2000. Now, we don't believe that that spike represents the real liability of W.R. Grace. And we've said so. We believe that spike represents something else. As Judge Weinstein indicated in a recent Order that he entered in the fall of last year, he says, "What's going on?" Because there was a similar spike with respect to the Mansville case. It says the Courts take judicial notice of

the continuing media and other campaigns encouraging a flood of new claims. And we know what those campaigns were. These are campaigns that have headlines like, "Find out if you have billion dollar lungs." It's the screening campaign. The trend is show up with the x-rays, and all the claims get filed. This was one of the better characterizations that I've seen of where the process is, and telling that presentation. It's the energizer bunny of toxic torts. It just keeps on going, and going, and going. That was the problem. Not our liability. Not our actual liability.

The difficulty of course was that at that point in time, that is by the year 2000, we believed that if you did an estimate again using the same models, we were still solvent. And we will be demonstrating that. But the problem was that the claim volume was going against us. It was going the wrong way. And there's nothing that we could do to control it. We had absolutely no alternative in order to deal with that new influx of claims but to seek a different venue and a different procedure in order to resolve that problem.

Now, counsel says, "Gee, well if all this is true, why don't you provide any evidence of it?" The Court is already familiar. These facts are undisputed facts. But he is also wrong that there is no record of it. In fact, there is a very clear and specific record of it. It's just that they have chosen not to point it out to the Court. Exhibit F to our

brief is a financial statement, 10-Q, issued in September of the year 2000. And by this time there's a trend process still under way, and we're not quite sure where it's going to end up. Okay? We disclose at that point that there are new bodily injury claims in the first nine months of 2000 that are significantly higher than any comparable period, that more time experience analysis is required to determine what to do about it. After the turn of the year, this was the best and newest release for January 29th. I'll call it Exhibit G. By this time we now have most of the claims in for the year. We're now focused on what our credit situation is.

This discloses the company's 364 day bank facility, matures in May. The current bank credit requirement which is tight over the past several months, coupled with the uncertainty from these asbestos litigations environment have increased the risk that this facility may not be renewed. And if it's not, we're gonna have some other problems in our financial future. What does that mean? Grace's advisors are reviewing the strategic options, including Chapter 11. Was there no declaration? Was there no declaration on the date of filing that disclosed the management problems? There certainly was a declaration. Mr. Siegel, general counsel of the company, sent out this declaration on the 2nd of April contemporaneously with the petition. And this declaration specifically talks about the management problems. It says,

"The recent dramatic influx of new claims has severed whatever tenuous connection to actual liability that may have existed in earlier years, and in effective defense of such disbursed and voluminous litigation is simply not feasible. The dramatic increase in asbestos claims and recent adversarial litigation impair the Debtor's ability to obtain financing, consumes management time and attention, threaten the health of the Debtor's core businesses. Under these circumstances, Debtors have concluded that there is no other way to timely resolve the asbestos liability while preserving core businesses, other than file the Chapter 11." A plain, clear, evidentiary submission. It was sufficient data in connection with our request for preliminary injunction. It was accepted by the Court. It was never contested by any of the parties. It was never contested by Mr. Sobol or his firm or any of the clients that they represent. And in the face of this, they never even sought to obtain the deposition to find out if there were any contrary tasks or any contrary evidence. The record is palpably clear. It's painfully clear. It's the pain that drove us to file this Chapter 11 case.

Was that a reasonable judgment? Well, the standard is not reasonableness. We all know it's a reasonable judgment. Look at all the other companies that have made exactly the same judgment -- exactly the same judgment. Do we blink away the reality of what all these companies have done, and say,

"Oh, gee, none of them have to be in Chapter 11. This Motion to Dismiss is really a motion to dismiss all these different cases. All these companies have got to go back to the State Court system." That's not a credible argument.

What about SGL Carbon? It would really be ironic if SGL Carbon did what counsel says. Remember that the Supreme Court, on appeal of a decision coming out the 3rd Circuit in Am Chem -- the Supreme Court specifically found that the asbestos litigation system was an elephantine morass -- I think the words were. It was broken. And it recognized that it was broken. The Supreme Court in Am Chem rejected Rule 23 settlement as a way out. So we now have a problematic tort litigation system in the State system, a Federal Rule, Rule 23, that is not available. Bankruptcy look like the only recourse. Is what they're saying that the 3rd Circuit then turned around and in asbestos, exactly the same context that the Supreme Court was addressing, said, "Oh, bankruptcy's not available either for asbestos mass torts"? That would be highly ironic. It's not what they did.

Take a look in asbestos bankruptcy. What are the major features? Thousands, or hundreds of thousands of claims. Claim volume. Payment of hundreds of millions of dollars. We're still paying. And all these things are true of Grace. There's no issue about that. You cannot manage the influx and change in the flow of claims. It threatens the company. And

look what it's done with other companies. Driven them under. It's destroyed them. For Grace, Chapter 11 was the only alternative. These are all of the record. There are facts on the record. There is nothing that they have submitted that says that they're wrong.

What does SGL say? Well, SGL did not involve a mass claim situation. Indeed it contrasted, in one of the footnotes that I can identify for the Court, a situation SGL Carbon versus that in Dow Corning and H. Robins where there were massive numbers of claims. What about the payment of dollars? SGL Carbon hadn't paid a dime. There'd been no payment, no judgment. The Court says it's premature. It ain't premature with us. We're paying the money. We paid the money, and we're still paying the money. SGL Carbon litigation was under control. Here it was not under control. That spike is under control? We can't control that spike. With SGL Carbon the Court made the specific finding that there was no threat to the enterprise. Here, it's exactly the opposite. In contrast to our situation where Chapter 11, as the Court has appreciated, is the only alternative. There, Chapter 11 was solely a tactical move. These are completely poles apart. To say that we're under control and that we can go and manage our situation, is -- wears blinders. It's unreal.

I want to point out one particular case in this process.

And I think that the Movant's here have focused on it because they realize that it's a very similar situation. And that's the Dow Corning case. They point out that in the case of Dow Corning -- which is one of the cases that was identified here -- see, even in Dow Corning, the company reported a loss in 1994, the year just before the Chapter 11 was filed. Now, I was lead counsel for the litigation involving Dow Corning before the Chapter 11. I represented the company in the Chapter 11. And it didn't strike me as strange because I went back and got -- and checked. It turns out, yes, there was a loss of $6.8 million that year. But the reason there was a loss, as we'll see in a minute, is that they took an enormous reserve that was designed to cover all their asbestos clients for then and in the future. What it didn't tell you was that retained earnings that they had for the year were $597,000,000. This loss was no illustration of the company's financial strength.

And, again, why was the reserve taken the year it was taken? Because they had a global settlement. And that global settlement had opt outs. And what they did is they priced out the global settlement and they priced out the opt outs and they bumped the whole thing off at once. And so you see the implant reserve of 475,000,000 with a long term reserve at 1.9 billion. And yet even with all of those reserves they took that equity of $676,000,000. How much cash did the company

have? $201,000,000. This was not a company that even when it looked at its reserve was facing a big financial problem. What they were facing was an enormous logistical management problem. We were successful in trying cases for Dow Corning. And we realized that there was no way that we could keep trying -- and I think the nearest counting in Texas alone, we had 90 cases in separate file in a three month period in three different Courts. We just can't cut it.

If you take a look at Judge Specter's opinion on estimation, 211 Bankruptcy 545, he specifically talks about this. He says, "Since many of the trial dates were overlapping, the situation facing the Debtor was daunting. According to the Debtor, the possibility of defending itself on so many fronts simultaneously was financially and logistically impossible. Financially, the total cost to litigate each of the pending trials would have been staggering. On the other hand, the Debtor was not willing to succumb to what it thought were exorbitant settlement demands. Logistically, the Debtor felt it simply could not muster the manpower necessary effective to defend itself on so many concurrent fronts, and therefore filed a Chapter 11." That's exactly what happened. Exactly what happened here.

MR. SOBOL: Briefly, Your Honor?

MR. BENTLEY: Your Honor, the Equity Committee. May we be heard briefly?

THE COURT: Yes, sir. Would you enter your appearance please?

MR. BENTLEY: Yes, Your Honor. Philip Bentley of the Kramer, Levin firm on behalf of the Official Equity Committee.

THE CLERK: Bentley?

MR. BENTLEY: B-E-N-T-L-E-Y. Your Honor, I'll be very brief. We -- the Equity Committee strongly supports the Debtor's position here. We filed a short pleading explaining our views. I won't repeat what Mr. Bernick has said, but I think it may be helpful to add a brief comment on the SGL case, where my firm was counsel for the Plaintiffs who prevailed in the 3rd Circuit. And I, in fact, argued the 3rd Circuit appeal. The SGL case, as has been pointed out, was fundamentally different from this case. And I would say it's differences fall into three basic categories. In the first place, SGL had none of the unmanageability aspects that Your Honor's very cognizant of here, and that Mr. Bernick has spoken to. SGL was essentially one suit. It was a nationwide class action in Philadelphia. There were seven opt out suits. But all but one of those were in the same Court as the MDL class action. So there was no argument ever advanced that it could be handled more efficiently in bankruptcy, let alone that the Debtor was completely beyond itself in trying to handle the litigation. There were no efficiency benefits of a bankruptcy filing in SGL.

Second, in SGL there was no financial distress whatsoever that the Debtor was facing before it filed bankruptcy. The Debtor wasn't losing customers or employees, and it wasn't as Grace was here, facing any risk at all of a downgrade of its credit or a possible loss of its credit facility. Indeed, the Debtor in SGL, the great bulk of its debt was either held by its corporate parent -- this was a subsidiary of a very large, very solvent German company -- or was guaranteed by the corporate parent. So, completely different situation. They didn't have a need in SGL to rely on the capital markets as Grace does here. And obviously that's a very big difference because the capital markets can very easily get spooked, can very easily get very concerned about massive mass tort litigation.

One third and final fundamental difference between SGL and this case. In SGL there was no futures problem. And as the Court knows, as the judicial conference report spoke about 10 years ago, and as many others have commented, in mass tort there's a fundamental issue of futures. If the Debtor winds up being rendered insolvent, futures can lose out altogether outside of a bankruptcy. And that's an issue that while we don't think it will ever come to pass here, it's an issue that was conceivable outside of bankruptcy in the W.R. Grace situation. The Plaintiffs, as we've heard, argue that Grace is insolvent. They argue that its assets aren't nearly enough

to satisfy all the claims against it. And if there were not a bankruptcy filing, then obviously the first Plaintiffs to the pie, so to speak, the Plaintiffs who get settlements and who recover judgments prior to the conceivable insolvency would be paid in full, and later Claimants would be paid -- would have much more trouble getting paid. That is a problem that the bankruptcy filing solves, and a very important point.

So to sum it up in a nutshell, and from the perspective that I think was pivotal to the 3rd Circuit in SGL, the crux of the 3rd Circuit's decision as I read it in SGL was that there was no reason articulated by the Debtor there that it couldn't have waited until the litigation had advanced further. Indeed, that it couldn't have waited until a potentially huge judgment was entered against it in SGL, as had happened in Texaco where there was a huge judgment and the bankruptcy wasn't filed 'til a year after the judgment. There, there was no reason put forward why the Debtor couldn't have waited. Here, of course, if the Debtor were to wait there's the potential of the Debtor losing out, and of all the Creditors losing out. You have the unmanageability of the litigation eating away at the Debtor's resources inexorably. You have possibly dire effects on the Debtor's financial situation, and its standing in the capital markets. And you have this enormously significant potential impact on future Claimants. All of those are present here. Not one of them

was present in the SGL case.

THE COURT: Thank you.

MR. BENTLEY: Thank you, Your Honor.

MR. SOBOL: Your Honor, Mr. Bernick points to, I think, three sources of purported evidence for the financial difficulties of W.R. Grace. First, he points to a third quarter 10-Q, 2000, of Grace for the notion that it highlighted or anticipated difficulties down the road. That's terribly misleading. What the 10-Q third quarter statement said was that more time and experience and analysis is required to determine whether the number of future claims may be materially higher than current estimates. And we need to -- basically it says that we need to determine the impact this would have on future cash flow and recorded liability for future claims. That's what it says in November of 2000.

What Mr. Bernick doesn't tell you is that in January -- excuse me -- yeah, in January, two months later, Grace did just that. It took a look at the new claims. It made a new reserve. It anticipated the effect on cash flow and of its overall reserve for asbestos-related liabilities. And it issued a report on January 29th giving a new estimate. That estimate, by the way, was less than two percent higher than the prior year's overall reserve. And in that estimate did not indicate any significant future cash flow of Grace.

Second, Mr. Bernick points to the same January 29, 2001

press release for the notion that it in some way highlighted the possibility of an inability to renew a $250,000,000 bank facility. What he doesn't tell you is that that bank facility was renegotiated and renewed prior to the filing of the Chapter 11. And indeed it appears that it's the same D-I-P financing that Grace got approved on day one of its bankruptcy filing. Therefore, although there might have been some statement in late January of 2001 indicating that there might be some theoretical difficulty to renew this bank facility in the future, that never occurred. And in fact, quite the opposite occurred.

Third, Mr. Bernick points to statements in a declaration filed contemporaneously with its Chapter 11 on April 2, 2001. Now, Mr. Bernick and I both share this. We both had forgotten that that declaration had been filed, because Grace does not mention it in its opposition to the Motion to Dismiss. Had they remembered it or thought it important, they would have put it in their opposition. But they didn't. And had I remembered it, I would have addressed it. But I had not. Nevertheless, the point is this. The same exact kind of conclusory allegations that are set forth in the declaration that Mr. Bernick has now put before this Court, but which they forgot in their opposition -- those same kind of conclusory allegations were set forth in affidavits before the SGL Court. And the SGL Court indicated that it is not sufficient to come

forward with such conclusory allegations, and reversed Judge Farnan's findings of fact as clearly erroneous when based on them.

Finally, I would remark that with respect to the circumstances involving Dow Corning, I'm not aware of any Motion to Dismiss in Dow Corning. Therefore, I'm not aware of this issue being aired as to whether or not it was appropriate or not under the 3rd Circuit rule in Dow Corning to have that. But, again, what Mr. Bernick points to are markedly different circumstances that those that apply here. He talks about how defending itself was financially and logistically impossible. Now, despite all of Grace's harangue about the tort system and about the overwhelming nature of asbestos-related claims against it, you can go to this chart, Your Honor, which is the second to last document that I have in the materials I put before you earlier. This is a chart. This is page nine from the Debtor's consolidated reply that they filed a couple of weeks ago. The same chart had appeared in a document that was submitted close to the time last November.

Grace's position is that the so-called overwhelming spiking claims was a result of these 17 Plaintiffs' law firms. Grace's position before this Court is that these 17 law firms filed 22 frivolous asbestos-related claims -- excuse me -- 22,000 frivolous asbestos-related claims. They're able to identify who the law firms are, how many claims they've filed,

how many claims have increased over the prior period of time. It is hard to imagine if Grace can in the Court system understand that these are the culprits who are filing the frivolous cases, that the United States Courts, the States and the Federal Courts can't adjudicated in some kind of reasonable fashion the nature of those claims.

In other words, despite citations to Am Chem and Ortiz as elephantine asbestos-related problems, or the quotes taken out of context from numerous other jurisdictions, the Grace situation ultimately is unique. Not only is it a financially healthy company, they admit they're managing their claims well. They can show the 17 law firms that they think are the culprits. And, nevertheless, they filed a Chapter 11 petition. I would suggest, Your Honor, that if they can identify who the increase in claims came from, that they're probably well on their way to being able to manage them as well.

THE COURT: Well, I'm not sure how. Just because you can identify, to use your word, a culprit, doesn't mean that you can stop that culprit from continuing to act in that kind of a fashion. Does it?

MR. SOBOL: No, but then --

THE COURT: What are they going to do? Ask for an injunction in every Court in the country against 17 firms from filing what may be legitimate claims?

MR. SOBOL: No, I don't think so, Your Honor. But what --

THE COURT: I don't either.

MR. SOBOL: No. But what it does say is this. That Grace hasn't been able to come forward with evidence as to why it is that the State and the Federal Courts where they've been adjudicating these cases can't address issues of frivolous claims or not.

THE COURT: Oh, they very well may. The problem is, as I articulated earlier, you've got 50 states with innumerable State Court actions. And most of those states having several Federal Court Districts in which those issues have to take place. There is no doubt in my mind -- and I hope this record is sufficient to sustain it in the event that there is an appeal -- that Grace has a management of claims issue. There's a management of claims issue on my own docket in this case alone. And I'm only the one Judge who's involved in looking at the issues. I can't for the life of me explain or expect that Grace doesn't have a case management issue -- claims management issue with respect to the cases that it has to defend against. And I just can't understand where -- the number of Plaintiffs' asbestos personal injury Claimants alone against this Estate are so huge and being filed in every jurisdiction and continuing to be filed, but for the stay in this case -- how Grace could continue to manage its

operational business, let alone manage the claims against it.

The bankruptcy is the appropriate forum for bringing all of those claims to a head, to protect the futures interests to the extent that they're out there, and for looking at the property damage -- the known property damage claims as well. There is a funnel. Congress decided that there was a funnel for which Debtors, if they chose to elect it, could manage claims litigation against them. And this is it. And I simply do not see anything improper, abusive, or in bad faith about the fact that a Debtor elects that forum.

I quite understand why the Circuit may have thought that SGL was a bad faith filing. Had I been faced with that case, I probably would have found it to be a bad faith filing at the outset. There is no way that SGL is comparable to a situation such as Grace where you're dealing with hundreds of thousands of claims filed all across the country, and the kind of management issues that is extant in this case. It's just not factually similar enough to have much weight in the context of this case. And that's not to say I disagree with the holding, as I've already articulated. I think SGL was correctly decided by the Circuit, and would have found the same way if I'd been asked to, which I wasn't. But I don't think that it applies in this case. The facts are just simply totally different.

With respect to the evidence, the affidavit -- or the

declaration of the general counsel is of record. In addition, I don't think there is a dispute of fact. I've asked for it. Nobody stood up to tell me that there are facts in dispute. The facts that are undisputed alone indicates that there is sufficient evidence of record before this Court to say that this is a good faith bankruptcy filing. And I am not going to grant the Motion to Dismiss. So for those reasons the motion is denied. Mr. Bernick, will you present me with an Order? When can I expect -- or did we agree that it's gonna be within a week after hearing? Yes, we did. Okay, thank you. Pardon me just one minute.

MR. BERNICK: Sure.

(Pause in proceedings)

THE COURT: Yes, sir.

MR. SPEIGHTS: Your Honor, good morning. My name is Dan Speights. And I co-chair the Asbestos Property Damage Committee. And I've been sitting in the corner not expecting to address the Court today. But I do want to correct one innocent misstatement that was made during the argument, that had nothing to do with your ruling, but has a lot to do with something that will be before you apparently in April.

THE COURT: All right.

MR. SPEIGHTS: I represent the Anderson Memorial Hospital, which is the South Carolina class action which includes Zonolite claims. And an innocent misstatement was

made. Anderson was certified as a class action prior to the bankruptcy. And we will not be making a motion to certify that class action before Your Honor.

THE COURT: Okay. As a property damage?

MR. SPEIGHTS: As a property damage class action --

THE COURT: All right.

MR. SPEIGHTS: -- which includes both traditional property damage claims and Zonolite Attic Insulation and Masonry Field.

THE COURT: All right.

MR. SPEIGHTS: And I'm sure Mr. Sobol just didn't know that. I'm not trying to get in this dispute right now. I just --

THE COURT: Okay.

MR. SPEIGHTS: I just wanted --

THE COURT: He may have said that, and I may have misunderstood. But I appreciate the correction. Thank you.

MR. SPEIGHTS: Thank you, Your Honor.

MR. DIES: Your Honor, likewise, my name is Martin Dies. I'm on the Property Damage Committee, and I'm class counsel for a State Court class action pending in Texas called Orange County vs. W.R. Grace. I don't think this is a conflict. But since Your Honor requested clarification, encompassed in the class definition in the Orange County case are the Meculite Fill and claims dealing with public, private,

and commercial buildings, not private residences. So I don't think there's a conflict.

THE COURT: Okay.

MR. DIES: But just to clarify.

THE COURT: Yes, thank you.

MR. DIES: Thank you.

THE COURT: Okay, Mr. Bernick.

MR. BERNICK: Yes. Turning to the Motion for the Case Management Order, which I believe is the next matter up for discussion. I want to begin by making sure that the Court has the same reading of the status of the paperwork as we do, because I know it's not been probably the easiest thing to get through. At the Court's direction we separated the personal injury case management motion from the case management motion with respect to other claims. And we now, therefore, have two case management motions. And we filed the personal injury motion with the Court for transfer to Judge Wolin. We also at the same time filed a new case management order with respect to the non-PI claims. That is it's not only separate, but it's a little bit different because some of the dates that we had in our original motion were obviously not gonna be met.

THE COURT: Yeah.

MR. BERNICK: So I wanted to make sure that the Court was alerted to that. The underlying notice bar date and claim form materials did not change in any significant degree. Nor

did we, in those materials, separate out personal injury from non-personal injury. And the reason that we didn't is that there's still some prospect, I suppose, that everything could go all out at once. We can easily do that. But I want to make sure that the Court is clear we haven't done it yet. And therefore --

THE COURT: Yes, I understand that. I saw in your motion that will be transferred to Judge Wolin and the one that I'm going to be hearing, that the Debtor is hoping that we can get both of those notices out in whatever fashion at the same time to eliminate some of the expense. And I'm certainly willing to discuss that with Judge Wolin. If there is a way we can do it, I'm sure we will. I just don't know what his view is going to be about sending out notice on the personal injury side.

MR. BERNICK: Right.

THE COURT: I do know what my view is about sending notice out on the rest of the sides.

MR. BERNICK: Right.

THE COURT: And I think we need to do that. So --

MR. BERNICK: Right. And --

MR. BAENA: Your Honor, if I may, on that?

THE COURT: Yes, sir.

MR. BAENA: Scott Baena on behalf of the Property Damage Committee. Your Honor, in regard to your last comment,

and in regard to an allusion that Mr. Bernick made earlier about the fraudulent transfer hearing last week, I think it is important at this point for us to focus on what is happening in these various Courts in respect of these various matters, and how it affects what we were supposed to be doing today. Candidly, I'm not quite sure. But I want to air it with the Court. We did indeed have a hearing in front of -- or a meeting, I should say, in front of Judge Wolin on Wednesday of last week to discuss the fraudulent transfer cases. And the Defendants, the putative Defendants in those lawsuits, counsel for the Committees, as well as the Debtor were represented at that meeting.

Two very important things, I think, occurred at that hearing which may be implicated by what we're about to do here. The first is that Judge Wolin authorized the two Asbestos Committees to prosecute those causes of action. And the second thing he did was to bifurcate two issues from the entire case or claims engendering fraudulent transfer. He bifurcated the claim that the Debtors were insolvent at the time of the transfers, which as Mr. Bernick alluded to was 1996 and 1998. And in addition, he bifurcated the issue of reasonably equivalent value. And he said he will try those matters on September 30th. And indeed based upon the structure that he set in place, the motions -- or the case management orders that he anticipates us providing him, he

very much impressed upon me that he will be trying those issues on September 30th.

The significance of all of that, I think, is that because insolvency again as alluded to by Mr. Bernick very definitely involves the quantification of asbestos liabilities at the dates of the transfers which we intend to contest, it will entail an estimation of those liabilities at those transfer dates. So while we've been laboring under the assumption from time to time that PV is here, PI is in front of Judge Wolin, his ruling very, very much makes it clear to me that at least in respect to the fraudulent transfer cases the notion of the value of property damage claims at the transfer dates is before him. Because he's going to determine that in the context of the fraudulent transfer cases.

THE COURT: Well, as of the dates of the transfers, yes. But the case was filed two years later. So I mean that --

MR. BAENA: Understood.

THE COURT: -- may have some relevance, but it's certainly not going to be the means all and end all.

MR. BAENA: It isn't a mean all and end all, for sure. And indeed we would object to any such significance being attached to it. But, I think it does conceivably engender the starting place for the determination of asbestos property damage claims. And while it --

THE COURT: I'm confused. At the moment, I think what is before me is trying to figure out what type of notice, if any, ought to go out, and setting dates for bar dates for people to file claims. I'm not being asked at this point to determine whether the Debtor was insolvent, how much money the Debtor might have to put into a plan to meet the liquidation alternative test, what Claimants are entitled to share in the distribution scheme, and in what levels, or at this point in time anything to do with proof of the claims. I'm only at this point trying to get the claims filed.

MR. BERNICK: Your Honor, just to be clear, I'm sure that Scott wanted a chance to stand up and respond and inform the Court if he wants to. But what happened with the fraudulent conveyance has almost nothing to do with the business that's here before the Court, except only from a timing point of view, which is Judge Wolin's obviously anxious to get the matter resolved. He has explicitly said -- he has said to us that he understands that the question of whether there was an estimate, and whether the estimate was reasonable as of 1998 and 1996 for fraudulent conveyance purposes is different from the question of what now is the actual liability of the Debtor for all these different claims. I mean he has said that -- he went through this same issue in connection with the trial on the fraudulent conveyance claim in Babcock. There was an estimation that was narrowed down

too for the purpose of determining fraudulent conveyance. So if -- we can proceed on and talk a little bit about the program that we're proposing, to see if there are issues on that item.

THE COURT: Okay. Well let me hear Mr. Baena's second point first. But I'm only confused because I don't think that that's gonna adversely impact the issue about setting a bar date. But pardon me one minute.

(Pause in proceedings)

THE COURT: I'm sorry.

MR. BAENA: Your Honor, as part of the case management proposal that the Debtor has before you, there is in addition to a bar date, a proof of claim form and a notification program.

THE COURT: Right.

MR. BAENA: There is a proposal that we roll out for a couple of years a litigation process to deal with the valuation of property damage claims. And while we strenuously object to the entire notion of using this Bankruptcy Court to litigate the property damage claims, especially given the existence of 524(G), we would also observe that as a practical matter getting into those kinds of issues today or before September 30th would seem to me to be inappropriate.

THE COURT: Well, the issue of where anything is going to be litigated, if it ever has to get to litigation, I

don't think is something I need to determine today. If it's necessary to get into the Debtor's structure versus the Bank's structure versus anybody else's proposed structure for how to handle a schedule of litigation, I guess we can do that. My concern right now is I want to get the notices out to the entities who are entitled to notice of the bankruptcy filing and a bar date. And I want to get the claims filed of record so that we can start the pieces rolling that do need to be litigated. Whether they're litigated here or elsewhere, at this point in time I think is meaningless. I mean what we need to do is get the basic information filed so the parties can decide if they're gonna litigate.

Mr. Baena, I've tried to use, you know, the C word -- compromise, in this case very regularly. I hope that this is going to be a consensual plan. I am going to do everything in my very limited powers to drive you folks to getting a consensual plan together. The first piece that I need, and I think you need, is to get the claims filed of record. Let's get the claims in, and then fight about what to do with them.

MR. BAENA: We'll argue about the value of the claims, depending upon what sort of things you require in a moment. All I raise, Judge, is there continues to be this confusion between the various roles of the various Courts.

THE COURT: Well I'm --

MR. BAENA: I wanted to --

THE COURT: -- not confused. And I don't think Judge Wolin's confused.

MR. BAENA: Well I doubt that any of you are confused. I do want to point out, and I'm sure I demonstrate it all the time, my continuous confusion about what we're all doing in these various Courts. And I --

THE COURT: Well that's --

MR. BAENA: -- apologize for that.

THE COURT: -- a different issue. What you're doing -- I mean what all of you are doing I find very confusing. But I don't find what Judge Wolin is doing to be confusing. And I know what I'm doing. And I don't --

MR. BAENA: Okay.

THE COURT: -- find it to be confusing either. So --

MR. BAENA: I appreciate that. And I would also say that for what it is worth -- and I am just conveying information. But like most messengers I'm getting shot. What I'm also --

THE COURT: It's soft bullets, Mr. Baena.

MR. BAENA: I -- excuse me?

THE COURT: It's soft bullets.

MR. BAENA: Oh, okay.

THE COURT: Okay.

MR. BAENA: They use those when there are riots, Judge. And I don't intend to riot in this room.

(Laughter)

MR. BAENA: There's one other thing that I thought I would apprise the Court of. And that is that Judge Wolin has not set a hearing on the personal injury side of this motion which, as Mr. Bernick points out, is -- you know, contains the same features as the property damage.

THE COURT: Yes, I'm sure he hasn't done that because I haven't transferred it to him yet. I wanted to get through today's hearing before I do, because it seems to me that if we can work out dates that make sense with respect to these other issues, he may like the benefit of that information. So that's -- I'm waiting until today's hearing is finished. I will transfer that piece to him when I get back to Pittsburgh.

MR. BAENA: Okay. Having survived the soft bullets, Judge, I'm gonna sit down now.

THE COURT: All right.

MR. BAENA: Thank you.

THE COURT: Mr. Bernick?

MR. BERNICK: I think on the question of linkage, our view is that if they can go out together without delaying everything, that's probably more attractive from a cost point of view. At the same time, we don't know that it's worth it if it means that both sides of the slip -- that is we're anxious to proceed and to resolve some of these other issues. And we want to get a bar date and notice process under way

with respect to the non-PI claims as soon as we possibly can. And there may be some additional reasons why it doesn't make sense to do the bar date for the PI claims. Right now those matters can be taken up before Judge Wolin. I was trying to get through the paperwork before I got to the argument here. One of the pieces of paperwork is that we have filed a proposed claim form for the medical monitoring claims as well. We just did that last week. That's not up for determination this morning. But I did want to alert the Court to that. My hope is that we can get some agreement on the content of the form so that maybe it can be just wrapped into the program without the necessity of raising it at the next hearing. Maybe we'll get one of those issues where there is consent. And we'll certainly work hard to get there. If we can't get there, then we'll raise it at the next hearing, which I don't think is very far down the road anyhow.

THE COURT: All right. Well, it may make sense if we try to identify what issues are uncontested and what issues are --

MR. BERNICK: Right.

THE COURT: -- contested, and then get to the claim forms themselves if that's appropriate. Maybe someone has a better structure in mind.

MR. BERNICK: No, I think that that's fine. I think that when it comes to the issues, we're first of all talking

about property damage. And then we've got the ZAI. With regard --

MR. BAENA: If I can just interrupt. I'm sorry. When we were last here, it wasn't clear whether medical monitoring was in this Court or --

THE COURT: It's here.

MR. BAENA: -- Judge Wolin's.

THE COURT: It is here.

MR. BAENA: Okay. Thank you. Sorry.

MR. BERNICK: With respect to property damage, I think that the way that the issue sorts out in terms of why it's being done is very simple. And the answer is -- at least we can see it on paper. This indicates this is not a situation where it's new litigation. It's very old litigation. And a key fact from our point of view is that we believe it's been resolved, an awful lot of money has been paid and a lot of cases that have settled, dismissed, and a small number have been tried, or they can now hopefully be tried. So the bottom line is that if you take a look at the number of pending cases, we're now down to only seven pending cases. And as to the number of new cases filed, there was a whole period of time in the last few years when we didn't have any cases filed at all. There is one that was filed in 2001, just before the Chandler case. The basic fact is that we believe that this litigation is over. We've got seven cases

and we've reserved on the seven cases. And if we're only here to talk about the seven cases, we can probably resolve the seven cases. The question is, what else is out there?

We feel that the only way to get there is to have a bar date and have a process set up whereby if there are additional claims we get the information right up front with the special claim forms. And we will then be able to resolve what the value is, if any, of those additional claims. The only answer that I have heard with respect to this proposal is essentially the contention that, "Gee, why do we have to do this now? Why not simply liquidate the value of all the property claims into trusts?" And I think that that's one of the issues that's raised by the briefs. And they point to the Celetex case where apparently all the issues concerning the validity of property damage claims were resolved in the trusts. The problem, of course, is that this assumes that there's agreement between the parties on what the value or scope of the liability is, so you can then go forward and negotiate a plan of reorganization and set aside enough money to pay all those claims. But we don't have it. We believe that this litigation is over. Apparently they do not.

So they say, "Well, instead of doing -- instead of trying to determine what that value is in this fashion, why don't we have some kind of estimation?" But, again, the problem is going to be the same. We're going to say that the estimated

value, based upon the trend that's here is we don't think there are any more claims. We believe the claims that are there may be subject to very important special defenses. So estimation simply will be a disputed process were it to occur. And the key issues that will drive that estimation are the very matters that we seek to get control over to the bar date process. That is who are the Claimants, how many claims are there, and are they subject to these special defenses? So no matter which way you get it, unless there were to be an agreement on a total sum of money that would represent the liability for those claims, we can't afford to sit there and say, "Well, let's do it later." And we can't afford to simply go into estimation. We need to find out who the Claimants are, and the nature of the claims.

I'll point out to the Court that in Celetex where they didn't do it, there was no agreement with respect to the value of the property damage claims. This is a page of a disclosure statement from the Celetex case. And it says that the property damage was set at $1,000,000,000. And then you look at the footnote, though. It turns out that the Committee believes that this amount is higher. There was no agreement on what the estimation was. What happened when they finally consummated the plan and they started the trust up and they started to present all these property damage claims? Well, a huge fight broke out about which claims were valid and which

claims were invalid. Here's just an excerpt that gives you a flavor of how striking this has become. There's a Motion to Compel in the Celetex case. Property Damage Advisory Committee files a Motion to Compel, seeking an Order directing the trust to pay certain asbestos property claims. These are certain PD claims.

What does the Trust say by way of its comment? "The Trust unequivocally and categorically disputes and denies the outrageous accusations and innuendo of bias in the Motion to Compel. The Trust has fairly and judiciously administered the Trust. The PD Advisory Committee continues to urge that the Trust must blindly pay every claim submitted to the Trust for payment. Refuse to yield to persistent, self-serving" -- obviously people feel very strongly that there's a real issue about what the valid claims are. But the Celetex's do nothing, wait until later approach does not advance the cause. And we would strongly urge that that approach not be adopted here.

THE COURT: Mr. Bernick --

MR. BERNICK: We believe that we've got to --

THE COURT: I'm sorry.

MR. BERNICK: Sure.

THE COURT: Go ahead.

MR. BERNICK: We've got to get the number of claims and find out some basic information about them.

THE COURT: When you're talking property damage, you're talking public buildings --

MR. BERNICK: Yes.

THE COURT: -- essentially -- non-residence.

MR. BERNICK: I'm sorry, yes.

THE COURT: Correct?

MR. BERNICK: The traditional public building kinds of cases. That's correct. Office building cases.

THE COURT: All right. And the Debtor at this point thinks that except for the seven that are remaining, there are no others out there. But what you want to do is identify the universe.

MR. BERNICK: Yeah. We want to constrain the universe and then get basic information so that if there are some more that come in, we know how amenable they're gonna be to a statute of limitations defense or to a product risk defense.

THE COURT: All right.

MR. BERNICK: And we'll litigate those issues.

THE COURT: Well with respect to the first issue --

MR. BERNICK: Yes.

THE COURT: -- identifying the universe --

MR. BERNICK: Yes.

THE COURT: -- I agree the Debtor needs to identify the universe.

MR. BERNICK: Right.

THE COURT: So to the extent that there is an objection to the contrary, it's overruled. I think the Bankruptcy Code itself requires the Debtor to identify the universe in order to deal appropriately with all Creditors who will be entitled to a distribution from the same class. And to the extent that a Creditor chooses not to file a claim, then, you know, if the Debtor has a discharge and nothing's paid, that's the way it will be.

MR. BERNICK: Right.

THE COURT: So with respect to the identification, yes. A proof of claim bar date must be set. The question now is, do we look at the proof of claim form the Debtor proposes and see whether or not there are objections to it? Or --

MR. BERNICK: Well, I --

THE COURT: -- where do you want to go from there?

MR. BERNICK: Yeah, I think we can go in that direction, and then maybe take up the Zonolite, which is a separate issue. Because I believe that the Zonolite people object to the notice program. The traditional property people I don't believe have interposed an objection from those programs.

MR. BAENA: Yes, we have.

MR. BERNICK: Well I guess so. They didn't have any witnesses, so we made the assumption that they didn't. But

the -- on the property claim forms I think that they have objections that the questions are too burdensome. So if they want to go through those objections, we can respond.

THE COURT: All right. Where are they in the binders now?

MR. BERNICK: The property damage claims are Exhibit G and H in the original consolidated reply brief. Exhibit G is the property damage claim, traditional property. And Exhibit H --

THE COURT: Which number on the binders?

MR. BERNICK: These are number -- it's the consolidated reply. I don't know which --

THE COURT: Is this in 11?

MR. BERNICK: Yes.

(Pause in proceedings)

MR. BERNICK: If Your Honor would like one, I can just hand it up to you.

THE COURT: Oh, that would be much easier.

MR. BERNICK: I brought one along.

THE COURT: Oh, thank you very much. Oh, perfect, thank you. All right, let's look first at the asbestos property damage proof of claim form. Do we all have the same document for the traditional, not Zonolite claims, Mr. Baena?

MR. BAENA: Yes, we have the document.

THE COURT: All right. Would you like to address it?

MR. BAENA: Yes, I would. May it please the Court, first let me just make sure the Court is well aware of the property damage constituency that we represent. We actually view it as having two components. The first is Zonolite, which you've heard so much about and we'll hear more about. And the second is what we refer to as traditional property damage. Traditional property damage claims, I would define, Judge, as everything other than Zonolite Attic Insulation claims. And, therefore, it may include residential claims, but for products other than Zonolite Attic Insulation.

THE COURT: Okay.

MR. BAENA: The Anderson Memorial class action, as a matter of fact, includes residences in South Carolina for other product. And in terms of the product, the principal product that engendered most of the litigation, but not by any means the only product that contained either manufactured or naturally occurring asbestos was Monokote-3. There were numerous other products that Grace manufactured over the years that included asbestos that was added -- manufactured asbestos that was added, or which had naturally occurring asbestos in that product, similar to the naturally occurring asbestos problem with the Zonolite Attic Insulation. So there's a vast array of products out there. And there are numerous types of claims. And we continue to believe that there is an enormous amount of property damage liability that is confronting this

Debtor. Indeed, I would only point out, Your Honor, that while the Debtor continuously refers to only seven pending lawsuits, some of those lawsuits cover every building in the State in which the lawsuit was filed.

THE COURT: Well, that's okay. The point is we need to identify the claims.

MR. BAENA: Right.

THE COURT: You've convinced me.

MR. BAENA: Right.

THE COURT: We need to identify the claims.

MR. BAENA: Right.

THE COURT: So let's get to how to do it.

MR. BAENA: Okay. I just don't want there to be a misapprehension about the size of the claims.

THE COURT: I'm not misapprehending --

MR. BAENA: Okay.

THE COURT: -- the size of this case. I assure you. To the extent that my rulings on the Motion to Dismiss were not clear, I'm not misapprehending the size.

MR. BAENA: Okay. In terms of the proof of claim form itself, Your Honor, I think the threshold issue is what philosophy are we going to apply to the proof of claim form? What importance are we going to attach to it? If the proof of claim form is merely to identify people who can participate in this proceeding, the nature of the proof of claim form becomes

a very simple matter for us to deal with. It merely only has to identify the players. On the other hand, if the proof of claim form is somehow going to be used to value the amount of the claims, the process becomes far more cumbersome. And in our humble judgment, it becomes impossible for Claimants to clear all of the hurdles that would necessarily be entailed by preparing and submitting a proof of claim that quantifies the value of their claims against the Estate.

The Debtor actually takes a position somewhere in between. The proof of claim form that the Debtor has propounded does not quantify or even enable somebody to quantify the value of the claims that it's confronted by, although Mr. Bernick says they're very interested in knowing that information. And it isn't on the other end of the spectrum, a proof of claim form that merely identifies people with claims. Rather, it is a litigation device which is designed with one function, and one function only in mind. And that is to determine what defenses the Debtor could utilize to defeat property damage claims generally, and those claims specifically. They really only seek information in respect of two things from their proof of claim forms. They only seek to find out whether statute of limitations is applicable, and whether the claim itself is barred by some other notion of preclusive theory of law.

As the Court is well aware, a proof of claim form isn't

designed to do any more than identify the people involved in the case. And we're aware and cognizant of that requirement in this case.

THE COURT: Well, it's also designed to make the person attach the documents that support the claim, and to provide some evidence as to the value of the claim. So if you want to go back to the specific purposes --

MR. BAENA: Well --

THE COURT: -- we could get there.

MR. BAENA: Well, let me suggest to you, Judge, while you might view that to be a purpose of a proof of claim in other cases -- and that's not always the case, there are exceptions to that -- it certainly isn't the case in this kind of case -- in an asbestos case. Because indeed under Section 524(G) the determination and the payment of those claims is deferred to a trust.

THE COURT: Yes, but the estimation of whether the Debtor has sufficient resources to fund it is left right here. And without some evidence of what that estimation is going to encompass, I have no means of determining whether the Debtor has satisfied its burdens under 524 or any other provision of the Code. So we need some estimate of value.

MR. BAENA: Judge, respectfully, in every other case that information wasn't required. And the estimation was performed. And despite what counsel says, those cases that

have had trouble, haven't had trouble because of their inability to define the universe of those claims. Celetex is not a case that's in extremis because they didn't know the value of the claims. Celetex is a case in extremis because of the funding mechanism not being there from the first day.

THE COURT: Well, I agree, Mr. Baena, you can get the estimation in any number of ways. But it seems to me that the simplest and most efficient way, particularly where at least in the Debtor's view it's not expecting a large universe of claims to come in on the property damage side, is to have the entity that files the claim list what it thinks the Debtor's liability to it is, and for what product.

MR. BAENA: Judge, surely it could be for what product. In terms of what the amount of their claim is depends upon what actions that have been taken or not yet taken in respect of the claim.

THE COURT: Then it can state that.

MR. BAENA: But they're all unliquidated at this point in time, Judge.

THE COURT: Yes, of course they are.

MR. BAENA: And there is not necessarily any present ability to liquidate the value of those claims.

THE COURT: Well, I don't know about whether there is a present ability or not, because I don't know what the claims are.

MR. BAENA: Well, Judge, just by way of example, in Celetex, since that's the example that was used -- in Celetex the claims process that enabled the allowance and disallowance of claims took two years after confirmation of the bankruptcy proceeding.

THE COURT: Right. That's part of the problem.

MR. BAENA: That may be part of the problem, but --

THE COURT: Which is one reason why it wasn't a good idea to do it that way. So maybe we should try something different.

MR. BAENA: Well, Judge, I'm up for innovation. I agree with you. But I must say that if the innovation is to require individual building owners to provide the sort of information that you will need to actually determine the value of their claims, there won't be enough time that we could provide to them to do that.

THE COURT: Well, why don't we go through the proof of claim form itself and see what is objectionable and what your suggestions are to make it unobjectionable? Let's do it that way.

MR. BAENA: Well, Judge, I can make that real easy. I think they need to do any more than identify who the Claimant is, and the nature of their claim against the Estate, for what products. That's it.

THE COURT: Well, the nature of the claim, the

location of the building -- or I suppose it's going to be a building or other area that may have been adversely impacted, I suppose --

MR. BAENA: There is a --

THE COURT: -- by asbestos.

MR. BAENA: There is a digression though in respect of that analysis. Firstly, Judge, in other cases, although we may not want to do what they did, a building by building analysis at the proof of claim level was not required.

THE COURT: Well, I'm not -- I don't know what you mean by "analysis". If you're saying that a Claimant has to identify which building they contain --

MR. BAENA: Yes.

THE COURT: -- they allege contains damages --

MR. BAENA: They --

THE COURT: -- that's absolutely critical information. Because how else can the Debtor tell whether or not the same Claimant is filing duplicate proofs of claims? You've got to at least know that you have an asset that you claim was damaged by conduct or property of the Debtor.

MR. BAENA: The problem is, Judge, that so many buildings are encompassed by class actions or group claims that the amount of information is not available on an individual basis. I presume we're going to move eventually in this hearing to the issue of proof of claims by --

THE COURT: Yes.

MR. BAENA: -- classes. Certainly what the Debtor is proposing is that even in respect to certified classes, individual members of the class provide a proof of claim. That undermines the whole notion of the class --

THE COURT: Well, it does.

MR. BAENA: -- in the first instance.

THE COURT: I think it does. So --

MR. BAENA: So if we're not gonna require, as to the vast majority of building owners, that information because they're in a class, how is it fair to require that information as to multi-building owners?

THE COURT: Because if you own a building and you contend that it was damaged, and as a result you are entitled to a claim, you identify a building. If you own two buildings and you contend that one, but not both of them was identified, you identify the building that was damaged. If you own a whole slew of buildings, the same analysis applies. I don't understand how you can present a claim against an Estate and not know what property it is that you claim to have a property damage claim for.

MR. BAENA: It's because of the nature of the Debtor's business, Judge. And it's also relevant in this context that the damage that you refer to doesn't occur in most jurisdictions under applicable law until there's

contamination. Now, people have installed Monokote-3 or some other product in their building, and it has not yet released fires.

THE COURT: Okay.

MR. BAENA: Well, how do you identify the value of your claim in that context?

THE COURT: That's their problem, isn't it? That's what they have to do as a Claimant against the Bankruptcy Estate. That problem isn't any different for people with asbestos property damage claims as it is to anybody else. I mean an architect may be subject to liability because the architect did something improper. And everybody knows it's improper, but the building hasn't fallen down yet so you don't know what it's gonna cost to rebuild it. You get an estimate. You do what everybody else does in a similar circumstance. It may be difficult because of the universe of use of asbestos. That may be the problem. But the situation in terms of proving a claim isn't any different in this case than it is in any other situation. It may be more difficult because of some circumstances, but it's still the Claimant's burden. You don't get an allowed claim against an Estate unless you prove it.

MR. BAENA: Exactly, Judge.

THE COURT: Okay.

MR. BAENA: And my point is nor are you going to be

asked to allow those claims. Those claims will be allowed or disallowed in another part of the process.

THE COURT: Maybe, maybe not. I have to estimate them. In order to meet the confirmation standards, somebody has to show me what the hopefully close to accurate estimation of these claims will be so that I know whether the Debtor has funded appropriately to pay those claims once they are allowed. So however you slice it, I need the same information. And so do you.

MR. BAENA: I understand that it's part of the feasibility issue in this case. I understand that. The question is, how and when do you address it?

THE COURT: Right. That's what I said. Let's go to the proof of claim form. We're running out of time. We have like 20 minutes to get through this issue. And we're arguing about nothing at the moment, because I've already said we're gonna have a proof of claim form. So let's go to the merits of what the claim form is.

MR. BERNICK: Your Honor, can I make a suggestion? This claim form has been out there in pretty much its current form. It was slightly modified in November, but it was out for the last year. And I would have thought that by the time the briefs got filed, and they were very particular on if there's a particular question that's problematic, let's take it out. There's no such thing. There's a generalized

statement about burden. I can take Your Honor through this form in about three minutes. And you'll see the nature of the questions that are being asked and whether there's some reason why a particular Claimant wouldn't have that information. Maybe that's something we can take up. But I'm very mindful of the passage of time, and the need to talk about the Zonolite Attic issue as well. And maybe to expedite things we could go through the form right here and you can see what it is.

THE COURT: That's what I've been suggesting for 20 minutes.

MR. BERNICK: Right. The first obviously part -- very first part, part one, is the claiming party. Part two is information about claiming party's attorney. Part three is --

MR. BAENA: Let me stop you. The information in respect of a building owner ought not -- should not include things such as a social security number. In another case, I believe Babcock and Wilcox, that information was found to be invasive and unnecessary.

THE COURT: Well, if somebody objects to setting out a social security number, I suppose they can say, "I object," and not set it out. The problem still is you have the same issue with respect to identifying duplicate claims. And that is a good tool to use. I'm not trying to invade somebody's Constitutional rights. And I don't want to set out a social

security number. Okay. Maybe we can agree that the last four digits of the social security number should be stated.

MR. BERNICK: The real property for which the claim is being asserted is the address, when did you buy it, what's the property used for, how many floors does it have, square footage, when was it built, what's the structural support, have there been any interior renovations. And you have to then describe them. Then asked to make -- to specify the different kinds of claims. And the breakout there is Grace product on the property, or one of the mining or millings or processing operation claims. Then they take them up. Category one: Allegation with respect to asbestos from a Grace product on the property.

MR. BAENA: Can we stay with A before you move on to B? Are you moving on to B?

MR. BERNICK: A is descriptions of renovations. Okay? A is descriptions --

MR. BAENA: No, no. I'm --

THE COURT: A. Yes, go ahead, Mr. Baena. Real property for which a claim is being asserted.

MR. BAENA: Yes.

THE COURT: Okay.

MR. BAENA: Your Honor, I think other than identifying the building, if Your Honor requires that -- and of course we object to that -- that's all you need to know.

What is the relevance of this other information?

THE COURT: I'm not sure.

MR. BERNICK: Very, very simple. If somebody did a renovation of a number that would uncover the fact that there being asbestos there on a certain date, that's going to be highly relevant to the statute of limitations.

MR. BAENA: But you see, Your Honor, that's not what the proof of claim form is for.

MR. BERNICK: Of course it is. We're gonna sit there and -- these claims are gonna come in. There's gonna be a big dispute then about whether they have any validity or not. That's gonna be centrally relevant to the estimation. The property damages cases, the statute of limitations is going to be one of the main defenses of the case. There was a case that was just dismissed by virtue of the statute of limitations.

THE COURT: The issue as to whether or not the person filing the claim either owns the property or somehow represents the owner of the property is certainly relevant information, because since we're talking about asbestos property damage claims, you have to be able to assert that in fact you're entitled to raise that claim. So that information is relevant. The date of the purchase of the property is relevant for the same reason, because it may or may not be the Debtor's product. Because I can anticipate that at some point

people will say, "We know we have insulation. We don't know whose." And that may or may not be sufficient to bar a claim. It may take discovery to do it. The date of the purchase is relevant.

The date that any renovations were made to the property that involved insulation in that building is relevant. The date of any other minor renovations probably are not. I think this question needs to be restated to make it of relevance to the Debtor, because any interior renovations may be too broad. But interior renovations that involve the crucial issue in the case, which is whether or not A) the Debtor's asbestos products were used; or B) whether they were disturbed, is relevant information. And I don't see that there's a difficulty with a person producing that information --

MR. BAENA: Well --

THE COURT: -- in the proof of claim.

MR. BAENA: -- Judge, I presume you own a home. I tell you I couldn't give an answer to that question with all the renovations from time to time made to a home that we own for 20 something years.

THE COURT: But this is a commercial building. And if their renovations are -- it says -- I guess the question should be renovations been completed in the property since this owner had it. Because if it's beforehand, they're probably not relevant.

MR. BAENA: Some of these buildings have been owned by the same State, as an example, since they were built for 30 some odd years.

THE COURT: If they can't state it, Mr. Baena, they'll put that down. It seems to me that having them go through their records -- at some point you're gonna be doing discovery on this.

MR. BAENA: Well --

THE COURT: To the extent that there is some easy information -- and, frankly, whether or not they made the kind of renovations that would involve a replacement or a disturbance of asbestos products I would think would be something that would be a major renovation, not putting up walls -- down walls inside a building.

MR. BAENA: That's wrong, Judge.

THE COURT: Okay.

MR. BAENA: Putting up a wall could disturb the meculite fill in some of these buildings. Judge --

MR. BERNICK: But that's --

MR. BAENA: -- if I may finish. The most important part is under the Debtor's theory, if anybody fails to fill out any part of this, the claim is being denied.

THE COURT: Well, that's not my theory. And I will be the person making that determination. But it seems to me that this information is relevant. And a Claimant ought to

make a good faith effort to find it. If they can't, they ought to state why they can't. It may be that they just purchased the building and they don't have the records. It may be that their building burned down and they don't have records. There could be reasons why people can't fill this out. But it should be -- there should be an effort made to do it. That question should be restated to make it more narrow, Mr. Bernick.

MR. BERNICK: Yeah, we'll do that. Okay. We then have the category with respect to the Grace product. This is the non-meculite mining, milling or processing. And, again, the questions are very basic. What's the product as to which you're making the claim? When was the product installed? The name of the architect or architectural firm who designed the property? The name of the general contractor?

THE COURT: Well, this one I agree with Mr. Baena is going too far afield. Because depending on how old these buildings are, this information may be very difficult to get.

MR. BERNICK: If they have it. If they don't have it -- I mean it would seem to me at that point, Your Honor, if they don't fill in the blanks we could then take up the question of what to do about it. But with respect to some of these buildings, as Mr. Baena indicated, they may not have changed hands. They may know exactly what the story is.

THE COURT: Well --

MR. BAENA: Judge, I agree with where you're going, Judge. And let's think about the practical consequence of this. Where is the clerk gonna store these proof of claim forms?

THE COURT: Well, Mr. Baena's agent's going to.

MR. BAENA: Mine?

THE COURT: No, I'm sorry.

MR. BAENA: Mr. Bernick's?

THE COURT: Mr. Bernick's agent.

MR. BERNICK: Absolutely. We've done this in other cases. You hire an agent. It's all processed on computer. We can deal with the volume. And they're very happy to deal with the volume.

MR. BAENA: The date of installation if not performed by the current owner or operator is not known.

THE COURT: Well, it may be known. It seems to me that if they're alleging a specific product, then if the owner had it installed, the owner should know and should be required to provide that information. If it was installed prior to the owner, they ought to state what they know, if they know it. The rest of this, however, I think is discovery material. It's not relevant to the proof of claim.

MR. BERNICK: Fifteen through 18 we'll take out. Do you have any documentation related to purchase or installation of the product on the property? If so, attach it. When did

you first know of the --

MR. BAENA: Excuse me. Let's take that one. Judge, what relates to the purchase or installation of the product might include architectural plans, specifications, work orders. It could include a room full of information. This is too big a hurdle.

THE COURT: I think it is. How about if you have documentation, check off yes and describe in general terms what it is? And then if you want it later, Mr. Baena, you can ask for it. I'm sorry, Mr. Bernick. I keep doing that. I apologize. Mr. Bernick.

MR. BERNICK: Meanwhile, Your Honor, all this does is to -- and that's fine. All it does is when the information comes in, Your Honor wants to do the estimation or whatever process, at some point we're gonna need --

THE COURT: We may very well. But at least this will alert people. In fact, it could even be something like if you wish to attach it, attach it. Because some people may want to just get that off their books. At some point they're gonna have to prove whether it was Grace's product, when it was put in the building.

MR. BERNICK: When did you first know the presence in the property of the Grace product for which you're making the claim? Directly relevant to the statute.

MR. BAENA: No. I'm not sure what statute it's

relevant to. I'm not aware of a statute. In most jurisdictions that's not the rule.

THE COURT: I think it's encompassed with respect to the dates of installation. I mean we're not looking at personal injury claims. We're looking at property damage claims. And I think the statute is not going to be driven by when they know of the presence in the property. It's when they know that there may have been damage caused as a result of the product in the property.

MR. BERNICK: Well --

MR. BAENA: Right.

MR. BERNICK: -- this is now one of the issues of this case. That is first of all we may get people who say, "I don't know the date of installation." But they do know when the product was installed.

THE COURT: Fine.

MR. BERNICK: So we've now learned something new. Second, we have the issue about contamination. That ends up being basically addressed by expert testimony. The issue is not when they became aware of the contamination. That's only a term of art. We find out when they were aware of the product being there. And then if there's some issue that somehow contamination hasn't taken place, that's not resolved through the particular Claimant. That's resolved through expert testimony. We need to know when they became aware that

asbestos was there.

MR. BAENA: Judge, they don't need to know that information, because under every State that we think is relevant to this particular controversy, it is exactly what you said.

THE COURT: All right, gentlemen. This is how we're going to resolve these issues. Mr. Baena, you're gonna file a line by line item objection. All of you. Anybody who objects to any proof of claim form, you're gonna file a line by line itemization of your objections. Mr. Bernick, you're gonna attempt to resolve those to the best of your ability. If you're unable, in the next hearing you will tell me which ones you want me to decide. And in March I will decide these issues. If you need an earlier hearing before March, let me know. And some time today I'll give you an earlier hearing date.

MR. BERNICK: I think that's -- I think --

MR. BAENA: That's more efficient.

MR. BERNICK: -- that's well said. But in all fairness, these forms have been out there, amenable to any kind of objections literally for months.

THE COURT: Yes.

MR. BERNICK: And we've received nothing.

THE COURT: Yes, they have.

MR. BAENA: Well, they have, Judge. We filed a

response. And we did object to the proof of claim forms. And we said why.

THE COURT: Well, fine. If you want me to rule on your objection to the global terms, in that sense I'm simply going to overrule them because --

MR. BAENA: We have specifics in there as well.

THE COURT: -- we need proof of claim forms. Well, I want a line by line objection.

MR. BAENA: I will do that.

THE COURT: That's how we're gonna do it. And maybe we can get -- I don't know if we can get through this one so you can redo the drafts, Mr. Bernick.

MR. BERNICK: I just --

THE COURT: We're not gonna get through the others.

MR. BERNICK: Yeah, I guess I would prefer that Your Honor have the benefit of getting everything in writing, and at your leisure, rather than in the press of time here this morning, going through it and doing it. Obviously, our general position is that we're gonna need the information sooner or later anyhow. We may as well get it sooner and on a uniform basis, which is why it is that we've asked for it. And particularly with respect to people who are in the business of owning a building, there may be some burden. But it's not all that significant.

THE COURT: Well, I -- and I agree with that. To the

extent that records exist, I don't see any reason why they can't be attached at this stage. They're gonna have to be attached at some stage anyway. I do think, however, that some of these questions could be a bit onerous. And I don't think the purpose is to have people not file proofs of claim because they don't want to go through the burden of filing it either.

MR. BERNICK: But let's just touch on that for a minute. That's obviously true. When you're talking about people making this kind of claim, basically there is a burden associated with making the claim. If you're not inclined to shoulder that burden, you probably shouldn't be pursuing your claim to begin with.

THE COURT: Well, if you're correct that the vast majority of claims are already filed, then it's not going to be that much of a burden anyway, because you already know what those claims are. And are undoubtedly, since so many of them have been settled in the process of discovery with respect to them anyhow. So I think we should probably start with a simplified proof of claim form. And if it turns out that that's insufficient, then maybe there's some method of compelling additional information. I know you don't want to go out with notices twice. And I'm not trying to build that into this process. But I think that it can be stated in a fashion that will not be quite so burdensome. Maybe the Debtor can do a check-off list. You know, the Debtor may, for

example, know that you used Monokote-3 from 1979 to 1984, and not any other time, just hypothetically.

MR. BERNICK: They know that.

THE COURT: Well --

MR. BERNICK: You know, the -- well, we can certainly do that. That's a fact that's already known to the Committees. I really think that the best procedure is the one that you proposed, which is that they ought to go through and point out where they really have a very specific objection.

THE COURT: I think so.

MR. BERNICK: I'll respond to it. Can we get a deadline for them to do that?

THE COURT: Yes.

MR. BERNICK: Let's say a week?

MR. BAENA: I'm in trial next week, Your Honor, in Texas. I'd like to the week after.

THE COURT: Well, I'm here early next month. Our hearings are on March 18th. So if I give you a week, and give the Debtor a week to respond, we're back.

MR. BAENA: On March 18th? Come back on the 18th?

THE COURT: Yes.

MR. BAENA: That's fine. If I could have until the 12th to provide them with our comments --

MR. BERNICK: No.

THE COURT: No, the hearing's on the 18th. So I

need --

MR. BAENA: I understand.

THE COURT: -- I need the information so that they, number one, can hopefully modify the proof of claim, and also let me know what of these objections have not been resolved. So I don't think that schedule works. It's -- you need to do it sooner. I need their comments back essentially by the -- well, the 15th at the very latest, if you can get them to me in Pittsburgh. Because the hearing is the 18th. That's Monday.

MR. BAENA: When do you want us to provide our comments to them, Judge?

THE COURT: Well --

MR. BAENA: I am in trial the week of the 4th. And --

THE COURT: Well who else in your firm will be working on this?

MR. BAENA: Well, we have a number of people. And I could delegate it.

THE COURT: Okay. How --

MR. BAENA: We are also dealing with the fraudulent transfer issues --

THE COURT: That's a --

MR. BAENA: -- at the same time.

THE COURT: -- different problem. That's not on my

docket --

MR. BAENA: Another Court.

THE COURT: -- and I don't care about that.

(Laughter)

MR. BAENA: That's another matter. I have that other matter on my plate.

THE COURT: How about by March 8th?

MR. BAENA: That's great.

THE COURT: All right. March 8th for the line item objections. Anybody who's filing them, I would suggest that you try to get together a mini Committee so that we only have to go through these once. Everybody feed into these objections. And, Mr. Bernick, yes, file a consolidated response.

MR. BAENA: Now --

THE COURT: All right. Line item objections. Pardon me one second. This is to all of the non-asbestos personal injury proof of claim forms.

MR. BAENA: Now, Judge, the proof of claim form that we're working on now obviously anticipates an owner or operator of a building to file it. It is not designed to be used for a class proof of claim.

THE COURT: Absolutely.

MR. BAENA: And so we need to deal with that issue. And I don't know, you know, in what context you want to do

that. We have class and group proof of claim forms that haven't been provided to us.

MR. BERNICK: Well I -- we're gonna take up class here in a minute talking about the --

THE COURT: Well, I had the chance over the last week to read, I think, all of the cases -- at least all the cases you've identified. I haven't done any independent research with respect to the concept of class proofs of claim. And as a result, I had the chance to take the Debtor's argument and the Committee's argument, you know, under advisement. And subject to your convincing me otherwise at this argument, it seems to me that the process that Judge Gambardella followed in the First Inter-Relation case --

MR. BAENA: Inter-Regional.

THE COURT: -- Inter-Regional, thank you, case makes good sense. And as a result I think I have a procedural problem, which is I don't have a motion by anybody to allow a class proof of claim. I think we need to start with a motion to allow whatever the types of class proofs of claims are. I think that would obviate the need to look at the issue of certifying class actions in State Courts or elsewhere -- any other Court but here. I think there is some benefit to using that class process. I'm not making rulings with respect, for example, to the property damage claims that are already satisfied. I haven't examined it in that context. I'm just

talking in general terms. It seems to me that that use may be appropriate in this case. But I think I need an appropriate motion. I need an opportunity for people to respond. And then I need to consider it. I think the process that Judge Gambardella outlined is a very efficient process. I have a call in to her to ask her how it actually worked, because at the moment I don't know that. I'm only reading it from the case. Maybe those of you who were involved know. I don't. And to see whether she has some suggestions for how she might make changes to it. She also had a notice form of some form that was used in that case. But it's not attached, and wasn't part of that opinion. So I'd like to find out what she used there as well.

The issue that she addressed, and in fact other Courts have addressed, is whether you need to file an individual proof of claim either in addition to or in lieu of the class claim. She, and most of the other Courts that looked at this issue, decided you do not need the individual claims if you permit the class proof of claim, because in some senses it's duplicative. In other senses it essentially wipes out the class action aspects of the proof of claim form. I'm inclined to think that's probably right. But I'm not sure in every given case that you don't also need either an individual claim form or an identification of the Claimant. In her case she did not need to get into the individual proof of claim form

because attached to the class group was a list of all the putative claim holders. And she found that that was sufficient.

So that's what I think we need to do. We need to figure out how to get appropriate notices out. Then we need to figure out who the putative class members are. And then we need a list. Somewhere or other the Debtor needs a list of who the putative class members are. And it's gonna be important for both estimation and actual damage issues if we get that far.

MR. BERNICK: Your Honor, if I could address that for just a moment, just so that I understand what it is that you're contemplating, and what it is that we need to be responding to, we have at the end of the day a need to identify Claimants and claims, and to be able to put a dollar figure on them. And that's true with respect really to all the claims, but obviously with respect to the claims that we're talking about here. You can already see that when it comes to the traditional property damage claims that there's a lot of information that's necessary to be able to get there, and that you need the number -- you need who is a Claimant, and you need information. If we try to do an estimation, if we try to do a litigation, which is what we propose, these are the elements that drive that process. And at the end of the day, no matter if you have a class or not, ultimately it's not

the class that gets the release.

THE COURT: That's right.

MR. BERNICK: It's an individual. So you have to know who the individual is --

THE COURT: Right.

MR. BERNICK: -- at some point in time. Otherwise you're not dealing with the bottom line of, well, how much money do we set aside. Now, as we sit here in connection with the property damage claims, we know that there are seven claims. That's all that we know about. We can sit there, and on the cases of those Claimants and the information that we already have with regard to them we can determine the value of those claims either through litigation or through estimation. If we send out a class form in lieu of individual forms with respect to these claims, then we'll never learn how many more Claimants are actually out there.

THE COURT: No, I --

MR. BERNICK: And --

THE COURT: I'm sorry. I don't know why if you have seven Claimants -- number one, you wouldn't meet the numerosity requirements in any event. So if there are only seven Claimants --

MR. BAENA: No, no, no, Judge. There's seven pending actions --

THE COURT: Okay.

MR. BAENA: -- is what he means.

MR. BERNICK: I mean real actions.

MR. BAENA: Even though one of them includes every building in South Carolina.

THE COURT: But who are the Claimants? I don't care about the number of buildings. Who are the Claimants? In that case, for example, are they all public buildings owned by the State of South Carolina?

MR. SPEIGHTS: No. They are all private buildings, commercial buildings, houses, churches, schools who opted out of the schools class, and colleges who opted out. It's every type of building except Government buildings.

MR. BERNICK: There's an issue there about how many of them were settled. But Mr. Speights just made my case, which is that even if you had a large group of claims, you'd still have to know all about all those -- how many of those people have what type of buildings, and are they really gonna step forward at the end of the day and seek to have their particular claims recovered out of the class.

THE COURT: Well, you can do it --

MR. BERNICK: But --

THE COURT: I think you can do it in several ways. But the way that Judge Gambardella looked at this issue was to say that attach -- at some point, yes. Somebody has the burden of coming forward to identify the Claimants and, in

this instance I think, the building involved in the damages asserted. I agree with that. The question is, do you do it by individual proof of claim forms? Do you permit a class proof of claim form and have the representatives of the class adopt the burden of identifying the class members?

MR. BERNICK: No, that's what's very, very different.

THE COURT: That's what she did.

MR. BERNICK: But, no, what she did was a little bit different. What she did was to say, "I'm gonna let this case proceed as a class." And it actually had it defined under a people. And we're going to have them identify the Claimants. We're gonna go through class discovery --

THE COURT: Right.

MR. BERNICK: -- and all the rest of that. That doesn't solve the problem. The reason it doesn't solve the problem is that at the end of the day -- and that I think was a securities case.

THE COURT: Yes, it was.

MR. BERNICK: You're gonna do a calculation there that's a question of multiplying a certain number of people by a certain dollar recovery based upon a formula. Here, when it comes to individual buildings, you don't have any one formula fits all, at all. You need an awful lot more information in order to resolve the question of how many buildings there are. But even in the class, you still have a point in time at the

end of the day when people have to come forward and say, "Yes, I want to participate in the class recovery." In other words, just because it's a class action doesn't mean that all these players are in the process at the end of the day. So you have two basic problems. Problem one is determining the information that really is necessary to do an estimate. And a securities case is very, very different from asbestos property damage. And, number two is you have to know who's gonna actually step forward and assert a claim. And again, that's a situation which no one, class representatives or anybody else, no one can decide that.

The difficulty is that if you defer these items, you're gonna need them at the end of the day. But if you defer them, you produce a whole different dynamic in this case -- a very pronounced and difficult dynamic. It's the same one that Judge Posner identified in the Rhone Polenc class action certification in the 7th Circuit where he said, "If we were to certify" -- that was a case where there was a certain number of individual claims that were being pursued. But then -- and I think it was even Mr. Sobol's firm that was one of the firms that, "Let's turn it all into a class." And Judge Posner said, "You know what's gonna happen if you turn it into a class? It could go from here all the way up to here." You create a negotiation dynamic that is almost coercive, because the sheer volume of the class, even though you don't know

who's actually gonna be a Claimant -- the sheer volume of a class creates an economic threat that cannot do anything but dramatically affect the case. Even before you know how many people are really gonna come out of the woodwork, and even before you know any information about them, you've now introduced what Mr. Lockwood called, "Class Fear." The 800 pound gorilla in the case, and you don't even know who's a Claimant or the necessary information.

THE COURT: Mr. Bernick, that's why I want a motion filed that you can respond to. Because right now I don't have one. So I'm not in a position to even determine whether a class proof of claim is appropriate for any or all of these various constituents. Because the first thing I need is a motion to determine if one is appropriate.

MR. BERNICK: We want to do that. The question that I'm really raising today is this. Which is take up the class proof of claim. I think that actually the way that it was done in her case is pretty much what I'm going to say. She set the bar date. All of the claims came in. All of the claims -- individual claims as well as the class proof of claims came in. And she then took up the question -- and this is what we propose, I believe, in our papers, and what I'll reiterate here today -- we propose that after the bar date passes and you have the individual claims as well as having the proposed class proof of claim, you then take up the

question of whether to allow the individual -- allow the class proof of claims be used as the claim form in the case.

And the advantage of that is that you will have a piece of information that's very critical, which is how many individuals have actually come out and said, "I want to be there." So you'll know what truly numerosity is. And you will have information with respect to those individuals that will be very central to the question of whether you can even certify the class under Rule 23. Typically what happens in a Rule 23 certification is you have individual representatives. And you take discovery to elicit facts about, you know, predominance and individuality claims. Here, if you make -- you set the bar date and the individual Claimants come forward, you will have that information. You will know how many real Claimants are out there. And you can take up the question that was specifically identified in the American Reserve decision, the 7th Circuit decision. Remember at the very back end of the case the decision's remanded. And it's remanded so that the Bankruptcy Court can determine whether, in fact, the whole class mechanism is even necessary or whether the same thing could be achieved by having individuals file their claim and then package them up as a class, or package them up as a group.

All of those things should be before Your Honor. What we would strenuously object to is the idea that pending a

determination of class proof of claim, that the obligation of individuals to step forward and file a claim by the bar date somehow be lost. If you do that, not only do you lose the critical information, but you put us on a track that is gonna go forever. Why? Because if you certify that class, it's subject to interlocutory appeal. We can't go forward with dealing with the individual claims in the case. And at the end of the day we only learn who's the real Claimant when it's all over and people have shown up.

THE COURT: Well --

MR. BAENA: Judge, the problem with Mr. Bernick's argument is what he in essence is trying to do is defuse the entire concept of class action practice in bankruptcy. We know it does have a place in bankruptcy. He's trying to require people to opt into a class by the process he's creating. But they have to affirmatively file a proof of claim themselves, as if that proof of claim was somehow going to demonstrate whether they're in the class or out of the class. It still doesn't answer his fundamental question. In every other case -- every other Circuit that's handled this has said, "Class proof of claim is okay." It has not required in addition to that, that an individual file a proof of claim.

THE COURT: Well --

MR. BAENA: And this --

THE COURT: -- I don't know that that's correct, Mr.

Baena. Because in a number of cases, in fact, the individuals had filed the proofs of claim in advance. Not in all cases, but in some. And so the issue simply didn't come up in the context you're raising it now.

MR. BAENA: I agree. But --

MR. BERNICK: And --

MR. BAENA: -- if I may finish, Mr. Bernick. The fundamental problem with Mr. Bernick's iteration of the problem is that he says we have to have this information before we can determine the dollars. That's not a role you need to play in this case. He's looking for a precise determination of the value of a claim. If this process is going to be estimation, we've got to decide are we estimating property damage claims generally, or are we estimating the claim of each individual Claimant. He's taking you down the road where you will be estimating each claim.

THE COURT: Well, I'm not going to estimate each claim. If I have to try claims, I'll be making findings with respect to each claim. And it probably won't be done here. So that's a whole different --

MR. BAENA: Or in this lifetime.

THE COURT: Well, it's a whole different issue. I need a motion. If you're gonna request that a class proof of claim be filed, I need an appropriate motion by a representative of the putative class by a law firm that is

competent to handle it. Until I get such a motion there will be no class proofs of claim. Because I think that's what I need.

MR. BAENA: We --

THE COURT: So until I get it, all issues are preserved. There are no class proofs of claim until I get through an appropriate motion process.

MR. BAENA: We need to give notice of that --

THE COURT: Yes.

MR. BAENA: -- to each of those people who might have the right to file a class --

THE COURT: Well --

MR. BAENA: -- proof of claim.

THE COURT: -- that's the other problem.

MR. BAENA: To the class reps.

THE COURT: Oh, the class reps.

MR. BAENA: Or the putative class reps. We need to give them notice of that.

MR. BERNICK: I'm sorry. I guess I'm sitting out there a little bit. What we would be proposing in order to keep the ball rolling here, Your Honor, is to keep on going forward with the bar date and the people --

THE COURT: Oh, yes.

MR. BERNICK: -- can file the proof of claims. If they want to file a class proof of claim, they can do exactly

what happened in the First Equity case, which is they can file a class proof of claim. There's nothing about the bar date notice process that mutilate that. In this case everybody had to file. And then later on, actually the motion for class certification that was made was with respect to the 2,000 people that filed. And it was at that point that the Court -- I'm a little concerned with this. That if you take the motion of the class claim now, you won't have the same information that she had when she decided that case.

THE COURT: Well, I think --

MR. BAENA: This is an ambush, Judge.

THE COURT: -- what she did was took the motion to approve the class proof of claim when the class proof of claim was filed. I think that's how it happened in that case.

MR. BERNICK: That -- no, I mean the class proof of claim was filed, however, after the bar date. She set the bar date. All the claims came in, including a proposed class proof of claim. And then she took up the question of whether Rule 23 should apply.

THE COURT: Okay. Well, I think with respect to the property damage claims, not the Zonolite issues, I'm not sure it's going to make a difference. Because we need a proof of claim that's going to identify the basics that I've already put on the record. That's what I'm going to rule. I hope you folks will be able to find something that is acceptable to all

of you in terms of the format. But that's what I think this case needs. I don't expect it to be a massive undertaking. I do expect it to provide essential information. So let's get that far. Let's get a proof of claim together. If you file a motion to have a class proof of claim filed at some point, it'll get scheduled and I'll hear it. Unless and until I get that motion there will be no class proofs of claim, because I think that's the way I need to get it raised.

MR. BERNICK: And with respect to ZAI, same approach?

THE COURT: Well, yeah. I mean with respect to the need for an appropriate motion, I think I have to have an appropriate motion. Now, I do have motions pending in the ZAI matters to certify classes, which I don't have with respect to these property damages issues. So maybe it's a slight -- there is a slight difference out there. But I'm not sure it's a material difference. I think I need an appropriate motion to file a class proof of claim. You know, not on the property damage side -- on the Zonolite issues, it appears that all parties are in agreement that there are going to be some issues that will be common, primarily on risk factors and liability size.

MR. BERNICK: That's absolutely correct. The significance of the proof of claim forms of ZAI are exactly the same, but a little bit more dramatic. With respect to ZAI, again in order to determine even whether there are --

what the common issues are, you need to get the information as to the proof of claim. Because the proof of claim asks for, where is the product located? What's the use of the residence? How many times did you go up to the attic? Have there ever been renovations? All that type of information will bear centrally on the issue of what we can identify as being common issues to begin with. So when you send the proof of claim forms out, you can get that information and then be in a position to identify exactly how to frame the common issues. If you don't send the proofs of claim out, you can't. That's number one.

Number two, a huge significance, make no mistake about it, is that they'll sit there and argue that this is a 15,000,000 claim case. By a stroke of a pen you turn your claim into a 15,000,000 -- 10, 15, whatever it is. And it's worth billions upon billions upon billions. And we don't even know. That's the problem. You now have an imponderable that drives the entire case. Easy way to find out if it's true or not. Ask the individuals to show up and submit their claim forms. And then Your Honor can, with the benefit of that information, decide do you want to create this dynamic in the case or not. But unless you get those individuals to file proof of claims, you don't know what the real number is, and you don't have the relevant information. You can't make the judgment about whether it's worthwhile to the case to have a

15,000,000 person class.

MR. SCOTT: Your Honor, my name is Darrell Scott. I am the class counsel in the Washington class action. I just wanted to give the Court an idea of what we had intended with regard to Zonolite Attic Insulation claim. We had filed an adversary proceeding which we actually think was the appropriate procedural device. The Court will decide whether that's true or not. Absent a proof of claim process, we didn't see a procedural device for moving for certification. And so our intention was that if the Court began a proof of claim process we would file the appropriate class proofs of claim immediately, and immediately seek certification for those which have not been previously certified. So that's an issue the Court can tackle up front, early on in the process, hopefully resolve it long before a bar date lapses, and also cite whether those are claims that ought to be resolved through a proof of claim.

And as to the process, we're an adversary proceeding. That's our intention. With regard to this power, it is certainly very important to have their information to the Court with regard to quantity of Zonolite Attic Insulation that was sold by Grace, and its distribution of that product. Which would certainly aid this Court in determining the potential impact liability might have on Grace. The particular identity of homeowners is absolutely immaterial so

the --

THE COURT: Is immaterial?

MR. SCOTT: Immaterial. Whether it's -- the Court made reference to the fact earlier, for example, that homes change. Our own expert indicates that in the United States 20% of residents change residence every year. That's a moving target. The house is not a moving target. The quantity of homes is not a moving target. And Grace certainly has substantial evidence that would aid this Court in understanding the quantity of distribution, the locations of distributions, which we tend to believe are northern States, which would readily facilitate an estimation of the number of homes that might be involved and what potential costs would be, for example, of removing it, or merely warning.

THE COURT: Well, you know, I think at some point what we need to do is just spend maybe an entire day. I think maybe I'm going to have to specially set this. If we need to deal with the property damage claims on one hand, and the Zonolite separately, maybe we just need time to hash through some of these issues, which I don't think we're gonna get to do on an omnibus hearing date. My concern in the Zonolite matter is the Debtor obviously will have some records -- I don't know what sort at this point in time -- as to what it's distribution mechanism was, and over what period of time. That isn't, again, the means all and end all as to whether any

particular home had that product installed in it though. So knowing where the Debtor distributed and what it's intermediary distributors were isn't necessarily going to get where you need to go in terms of satisfying who may actually have a claim for installation of that product in home.

There is, it appears to me from the submissions of the parties so far, a vast difference of opinion as to whether or not there is even going to be any liability or what the risk level is. I don't know that we even should be getting very far with respect to this proof of claim concept until and unless that scientific piece is adjudicated. Because if it turns out that there is no such risk, or the risk is so minimal that it's not worth going forward, maybe we don't need to deal with these. And so what the beauty of having at least one class proof of claim to me is, it gives you the vehicle to do what the Debtor was calling a series of test cases. But I don't know about the binding aspect of rulings in test cases. I am sure about the binding aspect of rulings in the class action.

MR. BERNICK: But it works in both ways. Because as soon as -- and this is exactly what Judge Posner talked about in the Rhone Polenc case. As soon as you get that class proof of claim, for purposes of that threshold issue, I would urge Your Honor that I don't think you can even define what that issue is appropriately unless you have information that tells

you the mix of the uses that are out there. But assuming that you get that claim form views and you get the determination -- let's say the determination is unfavorable. Immediately, before we have any real idea of how many people are really out there and how many of those people really want their house come in and torn up and renovated -- see, we have people in this case that will say, "We own the company." And that'll make the true heavies here, which I'm willing to concede are Mr. Lockwood's clients. It'll make them look like second rate citizens. You create the dynamic that is exactly what Judge Posner says is the wrong use of class litigation, even outside of Chapter 11.

So, if Your Honor is looking for a way to neatly and quickly get to well what is it, what's the scientific issue, the neatest and cleanest way to get to it is to get the individuals to file their claims, and you tee up the issue as a common issue. If it turns out right -- or it's right from our point of view -- the other people who haven't filed are not bound. On the other hand, they've also not filed their proof of claim. We'd be willing to take that risk. If it turns out that they do have a claim, you simultaneously know two things. You know that they have a claim. And you know how many of them there are. So that their role in the case has been defined. If you use class, you will not get a definition of who the real Claimants are --

THE COURT: Well --

MR. BERNICK: -- and you'll produce this dynamic.

THE COURT: -- I don't know that it would even be possible to certify a class of 15,000,000 homes. You know, it's just -- the numerosity itself seems to me to be wholly impractical. You wouldn't do any better certifying that kind of class than you would not having any kind of class. So I'm not so sure that that makes sense. But it may make sense to look, for example, at the class that's already certified in the State of Washington. I don't know how many people are involved in that. Or perhaps just the Liddy group or some small subsection in which you can identify these issues, litigate those issues, and then figure out where to go from there.

MR. BERNICK: Or better yet -- and this is what we suggested -- to take the people who actually file a proof of claim, and you make them into a class. That way you could take care of all issues.

THE COURT: Well, you may be dealing with 15,000,000.

MR. BERNICK: I don't know.

MR. BAENA: Or only 15.

MR. BERNICK: If we -- but if only 15 people show up to present their claims --

THE COURT: There won't be a class.

MR. BERNICK: -- that tells us something that's very

meaningful, and there won't be a class. Whereas --

THE COURT: All right.

MR. BERNICK: -- in a class proof of claim you won't find out. We're back into the world of the towers.

THE COURT: Okay, gentlemen, we're way past when I'm supposed to be starting my other issues. You will hear from me with respect to a date at which we will address the property damages issues and the Zonolite issues. But for now I'm sticking with the schedule that I previously set in about the line item objections. I think maybe a discussion at some point about those issues will be productive. I do not think we're gonna do it on March 18th. I think I'm going to give you a special hearing date.

MR. BERNICK: Can we have the line item responses for the Zonolite claim form too?

THE COURT: Yeah, they're for all four proofs of claim form that I'm dealing with. I want line item objections to all of them. If I don't get a line item objection, that part of that proof of claim will probably be approved. Yes, sir.

MR. SPEIGHTS: I know you need to stop, Your Honor. Anderson is unique. It's certified. It's Zonolite Insulation. And it's traditional. Mr. Bernick effectively is trying to get you to decertify Anderson's claims. What we fought for, for eight years, I'm gonna say this in less than a

minute. If there was no bankruptcy, all we would do is go to trial on behalf of all the buildings in South Carolina, hundreds and hundreds of buildings, and present adequate proof as a class representative of how much damages we have. And all we need now, I believe, and I thank you for letting us have a hearing in which we can participate, is to let the class representative file the claim. And we will have to give you proof to estimate what Anderson's claim is. Otherwise we have a myriad of problems. And Mr. Bernick is in effect undermining the certification that's already by made by South Carolina Courts.

THE COURT: Well, I haven't -- I'm not aware of that certification, as I expressed my ignorance on the record earlier. So let me just start this discussion with that. I have a conceptual difficulty with how you have representative Plaintiffs that encompass schools and churches and public buildings and private residences. I have some difficulty with that concept.

MR. SPEIGHTS: But the South Carolina Judge in various opposition has certified with that.

THE COURT: Regardless, right now you're before me.

MR. SPEIGHTS: I understand that.

THE COURT: And I do not see --

MR. SPEIGHTS: But that's why -- he is arguing against what was done in South Carolina.

THE COURT: And I agree. It does not seem to me that there can be appropriate class representatives unless you're gonna bifurcate these classes into groups somehow for purposes of this proof of claim. I am certainly not -- not ever -- going to permit a class proof of claim to be filed that is going to encompass possible damages for schools and churches and public buildings and residences. I will not do it. I cannot see in any way how the damages could be the same, how the discovery will be the same, how the issues will be the same. I may permit some groups with respect to residences, and separately schools, and separately churches or other types of public buildings. But there is no way that one class proof of claim is going to be filed for every building in South Carolina. It will not happen in this Court. So figure out something that makes more sense than that. Because that doesn't make sense.

MR. SPEIGHTS: Well, and I'm glad --

THE COURT: It's not --

MR. SPEIGHTS: -- we're gonna brief it. And now just the last comment. It costs the same to remove a square foot of Monokote from the ceiling of a beam in a church --

THE COURT: It may.

MR. SPEIGHTS: -- as it does on a commercial building.

THE COURT: It may.

MR. SPEIGHTS: And that's what it comes down to.

THE COURT: It may cost the same amount. But whether people want to do it may differ significantly. And whether people want to opt in or opt out or not opt at all into those classes may be very different. And the owners of public buildings are not representative of owners of homes. They are not the same type of individuals who hold claims in a bankruptcy context. It may make sense from a State Court point of view. It doesn't from the context of this case. So figure out something a little less encompassing.

MR. SPEIGHTS: I will. And we're all private buildings in my class. And I think it can be done very easily.

THE COURT: All right. Okay. What else do we need to get through quickly?

MR. BERNICK: We have a very quick thing at the end, which is that there are applications that were filed for paying Dr. Francine Rabinowitz and a Mr. Hilton. Francine Rabinowitz is -- got expertise in the estimation of personal injury claims. And Mr. Hilton is -- got a position in connection with the Celetex Trust and National Gypsum Trust. We do not have any -- we realize that they have the ability to retain these people. But we have a very significant concern with what it is that they're actually going to do. Ms. Rabinowitz is expert only in personal injury, I believe.

She's got no background in estimating property claims. If they intend to use her as a way of gainsaying or contradicting what the personal injury people believe are the personal injury claims, I guess we can't stop them from doing it. But if they intend to use her to estimate property claims, we have a very strenuous objection. She doesn't have the qualifications for it.

With regard to Mr. Hilton, we're very concerned. Mr. Baena and Mr. Hilton have got a long history together. He is already working on the Celetex and National Gypsum Trusts. There doesn't seem to be any reason why we should be helping to pay for that exercise. If there's something incremental that he is going to do that is specific to our case, that's fine. But we don't think it's appropriate that we should have to bear the burden of funding the work that he's doing in other cases. So those are two issues that I guess we'll put in the category of being we do not agree to incurring these costs. We do not disagree with their ability to retain these folks, but we have an objection to their performing these kinds of activities pursuant to their retention.

THE COURT: Okay. Mr. Baena?

MR. BAENA: Your Honor, you have entered Orders approving these retentions already. And you enumerated in your Orders certain limitations that we are to abide by. And we will. I think it's entirely inappropriate for counsel to

suggest that he believes there's a limitation of expertise on the part of Dr. Rabinowitz that precludes her from being engaged for the purposes that we wish to use her. That's something better left for cross examination when and if we put her on the stand.

THE COURT: Please don't use her for something beyond the scope of her qualifications, Mr. Baena.

MR. BAENA: Of course.

THE COURT: We don't need to go there.

MR. BAENA: Of course, Your Honor.

THE COURT: Okay.

MR. BAENA: I will not. As far as Mr. Hilton is concerned, Your Honor, these motions were filed -- these applications were filed when perhaps we didn't even have to, as a result of conversations with the U.S. Trustee. Previously an Order was entered by Judge Farnan allowing us to hire these people without disclosing them. And all we had to do was put the amount of their fees, without denominating who they were being paid to, as a cost item on my bill. And that's what we were doing. In conversation with Mr. Perch, we didn't have any problem since we started to actually disclose the fact that these people had been doing things for us when we were coming before Judge Farnan on case management issues. We had no problem at this point filing an application if that set a good trend in these case. So that's why we did it.

Arguably, we don't even have to do it.

So in the case of Mr. Hilton, Mr. Hilton has not recently performed any services. He assisted us in evaluating the proof of claim forms, and assisted us with determining the process that would be employed for allowance or disallowance of property damage claims, which is entirely pertinent to the case management issues. He's been paid to date, I believe, for all of those services. We may wish to use him in the future if it's helpful to the Court, or if it's helpful to the Committee. But right now this is merely to take an undisclosed expert and disclose him.

THE COURT: All right. To the extent that what you're gonna be doing with these folks is calling them as expert witnesses, quite frankly I think Judge Farnan had it right. I'm not sure that anybody has to disclose that at this stage. You may very well in the course of litigation. If you're using them as consultants or something else, that's a different issue. But to the extent that what you're doing is nominating them as experts, I'm not aware of any provision in the Bankruptcy Code that says I have to approve experts.

MR. BAENA: It's very difficult to separate the function though, Judge. If I talk to Dr. Rabinowitz about how do we deal with an issue like this, as opposed to how would you testify to it, one could arguably say she's consulting and not providing expert testimony in that context, even though it

would be with a view towards using her.

THE COURT: Right. Well, to the extent that what you need is a comfort Order, I guess you've got it. So it's here.

MR. BAENA: I've got it. I've got it. And I'm perfectly content with the Orders that were entered by the Court.

THE COURT: Okay. What happened? Did I miss an objection and entered an Order?

MR. BERNICK: Well, it may be that that's what happened. It's not particularly material because, again, he does have the right to retain these people. But it just looks like there's a huge problem with what they're going to be able to do. And it's not a question of taking it up on cross. It's a question of who pays the fees in the process.

THE COURT: Well you can always object to the payment of the fee.

MR. BERNICK: Yeah, I understand that.

THE COURT: And it'll come up in that context.

MR. BERNICK: I understand that.

THE COURT: Okay. Mr. Perch?

MR. PERCH: Your Honor, I don't think I need to say too much about this. Mr. Baena is correct. Frank Perch for the U.S. Trustee. Mr. Baena is correct that it was, at least in part, a response to concerns I had raised about large, unexplained line items on the fee application, and my belief

that the original Order of Judge Farnan was relating to experts in collateral matters, not consultants for material bankruptcy issues in the case like noticing and claim estimation. But I think that Mr. Bernick, in his opportunistic desire to make an objection, is losing sight of the fact that by bringing these people within the number of retained professionals, instead of having the unexplained line item on the fee application, we're going to have -- of Mr. Baena -- we're going to have some understanding of who they are and what they're doing. So that if Mr. Bernick or I or anybody else in the case has a concern about whether they are doing -- they're billing this Estate for something that relates to Celetex or they're doing something beyond the scope of their retention, we can bring that before the Court. And that's exactly what I wanted to happen.

THE COURT: Okay. To extent that what they're doing is using them as experts, I don't think I need to look at that issue. And, frankly, I don't want to look at that issue. To the extent that they're using them as consultants, I probably do have to and I want to. Okay.

MR. BAENA: And that's the distinction we're gonna make.

MR. PERCH: Thank you, Your Honor.

THE COURT: All right. Okay. I'm not sure what's left today. I've kind of lost track of this in the context of

what we need.

MR. BERNICK: I'm sorry, Your Honor. I don't believe anything is left. I think we're all -- I think we've gotten through everything.

THE COURT: All right. So I do not need Orders on agenda items whatever they were, 12 and 13, or 13 and 14.

MR. BAENA: We never got to the notice program. But that is driven in large part by the rest of the things that were still to be decided.

THE COURT: Okay. I think we need a separate date for that. And that's what I propose. That's probably going to be scheduled in Pittsburgh, folks.

MR. BAENA: And we'd like to make that an evidentiary hearing, Judge.

THE COURT: Oh, no, not the first day, Mr. Baena. I just want to get through the issues. I'm not even sure at this point that I understand what the issues are. So this one's for my edification.

MR. BAENA: Okay.

THE COURT: If you need an evidentiary hearing after I understand it, then that's fine. But the first one, I just want to hear what it is that this universe is all about.

MR. BAENA: Okay.

THE COURT: Okay.

MR. BERNICK: These are some Orders.

THE COURT: All right. Okay. I was to get Orders. And let me make sure that this is what I have.

MR. BERNICK: Your Honor, those should be 7, 8 and 9.

THE COURT: Okay. I believe I entered an Order on 6 earlier. Did you get 6? Sometime in January. I thought I entered that Order at the end of the last set of hearings, on the motion to assume, sell and assign certain leases at docket 817.

MR. BERNICK: Your Honor, I believe you entered it with regards to extending the removal period.

THE COURT: The removal period?

MR. BERNICK: Yes. That was entered last month.

THE COURT: All right. So this is -- the first is on number 7, the Order extending the time to assume or reject.

MR. BERNICK: Yes, Your Honor.

THE COURT: Okay. Did you get an Order on 6? Because I thought I signed one. And if you don't have it, then I may be in error. I thought I signed a --

MR. BERNICK: Your Honor, we're not matching up on the numbers. When you say 6 --

THE COURT: I'm looking at uncontested matters, motion for entry of an Order pursuant to Section 365(A), Item --

MR. BERNICK: This says 7. All right.

(Pause in proceedings)

THE COURT: Could you please on the amended agendas not change the numbers of things? If you want to delete something, delete it. But don't change the numbers for me, please. It's too confusing. All right. Now what is it that -- I thought on your new number 7 that I had entered an Order last week on a stipulation. Did you get it or not? That's what I'm still trying to find out.

MR. KNAPP: We have not received it, Your Honor.

THE COURT: Is that what this is?

MR. KNAPP: Yes.

THE COURT: I'm not matching up the numbers. I'm sorry. This says it's Re: Docket #1532. What I have as number 7 is Re: Docket #817 and 1583. I'm not matching them up.

MR. KNAPP: That's what's on my agenda, Your Honor.

THE COURT: Then what's this? Here it is. This is on number 9. Okay, I see it.

(Pause in proceedings)

THE COURT: All right. This was original agenda item number 8. It's now number 9. And this Order was to be brought to the Court. Obviously it has been. I'm entering it. Okay. The next one is Re: Docket #1531. And that was original agenda item 7, amended agenda item 8. This extends the Debtor's exclusive period as requested. That Order is signed.

MR. CARICKHOFF: Your Honor, I think -- David Carickhoff with the Debtors. I think the confusion might be in the fact that we provided to Your Honor a draft of the agenda a couple weeks in advance. And then before we actually file it what we do is we at that time we have a better sense of what will be continued and what won't be. If it's easier for Your Honor to review the matters, we'd be happy to not change the numbers as per the draft that we give Your Honor. We'll just simply change the status.

THE COURT: That's fine. Just if you keep the numbers the same, if you just put in there, "deleted by agreement" or something. I don't care. Just so I don't have this problem following the numbers through. It's very confusing for me, and it's worse for my staff.

MR. CARICKHOFF: I understand. We'd be happy to keep it consistent with the draft we provide to the Court.

THE COURT: Okay. All right, the next one is -- I don't know what the next one is. It doesn't have a reference. Please also put the references in.

MR. BERNICK: Is it --

THE COURT: It's a Stipulation Order resolving Debtor's motion for an entry of an Order under Section 363 and 365 authorizing assumption and sale of a prime lease.

MR. CARICKHOFF: I believe that's the one Your Honor referenced previously that dealt with the Docket #817. And

the reason we didn't do it as referenced to a particular docket number is because it refers to several docket items. It not only resolves Docket #817, it resolves the complaints of American Real Estate Holdings, as well as the objection to American Real Estate Holdings. So the stipulation actually deals with three separate docket numbers.

THE COURT: That's okay. Put them all in. Rather than leaving them out, put them all in so that I have an idea of where they go to. Or if it's easier to refer to them by agenda -- no, put the docket reference in. That's how my staff needs to know that they're appropriately docketing the orders.

MR. CARICKHOFF: Sure, we can do that.

THE COURT: Okay. What is the resolution with respect to American Holdings, since I don't have time to look at this now?

MR. KNAPP: Your Honor, we're objecting to the lease. And we are paying amounts -- administrative expenses through December 15th, 2001.

THE COURT: Okay. All right, that Order is signed as well.

MR. KNAPP: And, Your Honor, one final question with regard to item 11. You set some dates. Would you like a Scheduling Order from us?

THE COURT: Yes, please. If you leave a date blank,

I don't think we're going to have time on your normal calendar to deal with those issues next month in March. So I'm going to give you a separate date. So if you would just leave the hearing date blank. I'll keep to the same line item issues, but change the hearing date. I will try to keep it as close to March 18th as I can.

(Pause in proceedings)

THE COURT: Okay. Mr. Zaleski?

MR. ZALESKI: Good morning, Your Honor. Matthew Zaleski, Campbell & Levine with a rather unusual housekeeping item. On Friday I was talking with Warren Smith on an unrelated matter. As you're aware, he's been nominated, if not approved, as a fee examiner in this case. Mr. Smith asked me to relay to the Court that he has an interest in discussing his engagement with Your Honor, but felt uncomfortable calling the Court, and wanted to know if either Your Honor would call him or grant some type of permission or a suggested time that he call you. I told you it was a rather unusual housekeeping request.

THE COURT: Could he just not come to Court and -- is it something --

MR. ZALESKI: Well he -- no, I think he has in the past in USG had been given direction, I guess, from Judge Newsome, or at least had a chance to discuss --

THE COURT: Oh, as to what he needs --

MR. ZALESKI: His job.

THE COURT: -- to do. I would prefer that he just come to Court and we can work it out with everyone. If he wants to appear by phone, that would be fine. I --

MR. ZALESKI: I got the impression this was a not having the parties involved, and merely having a chance to discuss with you. Judge Newsome has employed him as what is, in all intents and purposes, a 706 expert. And I think he has taken that instruction or guidance from him. And to the extent Your Honor is interested in doing the same, he sort of asked me to bring the subject up.

THE COURT: My view about the fee examiner is I want somebody who's gonna review the fee petitions, find out whether or not there are duplicative services, who's charging for what, and do an analysis of the fees. That's what I'm looking for. There really isn't any magic to what I'm expecting. I'm hoping that he comes to the conclusion that everything is just fine and appropriate, and doesn't have any changes that need to be made. But if he does, I want to know what they are and why.

MR. ZALESKI: Okay.

THE COURT: I don't really have more specific marching orders --

MR. ZALESKI: That's fine. I --

THE COURT: -- than that.

MR. ZALESKI: -- will relay that and tell him to focus on the former of those two options, and I think we'll all be set.

THE COURT: What I do need to know from him though is I still have this amended administrative order set which I was asked to defer until he is appointed because of the category issues. And that I do want an opinion from him as to how he would like that handled.

MR. CARICKHOFF: Your Honor, if I may. David Carickhoff with the Debtors. I had spoken with Mr. Smith about the billing matter categories. And his question to the Court was he didn't know if those were for the fee examiner's benefit or for Your Honor's benefit. To the extent they were for the fee examiner's benefit, he was content just for the firms to continue to use their regular billing matter categories. He didn't need this special set of billing matter categories, and in fact thought that might actually be more confusing than following what existing structure they already have. So if Your Honor could I guess clarify that point of whether it's for Your Honor's benefit to have that in place or for the fee examiner's, I don't know that the fee examiner feels that's necessary.

THE COURT: Okay. Well it was for my benefit when I didn't have a fee examiner. But now that I'm going to have a fee examiner, I think we need to do things that are copacetic.

So if he doesn't need them, I'm willing to see what it is that he proposes to do. It actually might be helpful if we just get him here and discuss these issues for a few minutes. I do not think it would take a long time.

MR. CARICKHOFF: I believe he'll be up for the March 18th omnibus hearing.

THE COURT: Okay. Anybody have an objection to trying to get Mr. Smith here and see if we can work something out? All right. I'm going to hold this administrative order, the amendment then until the March hearing again. Okay, any other matters that need to be addressed today? Okay, thank you. I'll expect to get your Orders in a week.

(Court adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Signature of Transcriber

3-5-02
Date